JOURNAL

OF

COMPARATIVE LEGISLATION

AND

INTERNATIONAL LAW

EDITED FOR

THE SOCIETY OF COMPARATIVE LEGISLATION

BY

SIR LYNDEN MACASSEY, K.B.E., K.C., LL.D.

AND

C. E. A. BEDWELL, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ἐφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

Third Series. Vol. V.
(Comprising Numbers I and IV.)

LONDON:
SOCIETY OF COMPARATIVE LEGISLATION,
1 ELM COURT, TEMPLE, E.C.4.
1923.

[*All rights reserved*]

All communications to be addressed to the Hon. Editors,
1 *Elm Court, Temple, E.C.*4.
The annual subscription to the Society is one guinea.

BIBL.
LONDIN.
UNIV.

Printed in Great Britain by Hazell, Watson & Viney, Ld.,
London and Aylesbury.

BIBL.
LONDIN
UNIV.

CONTENTS OF VOL. V.

PAGE

THE NEW CONSTITUTION OF INDIA 1
Contributed by the RIGHT HON. LORD MESTON, K.C.S.I.

THE DECISIONS OF THE ANGLO-GERMAN MIXED ARBITRAL TRIBUNAL 17
Contributed by EVERARD DICKSON, ESQ.

THE PARLIAMENTARY SYSTEM IN NORWAY 35
Contributed by H. B. LEES-SMITH, ESQ., M.P.

NATURALIZATION AND CITIZENSHIP OF MARRIED WOMEN IN THE UNITED STATES 47
Contributed by R. NEWTON CRANE, ESQ., K.C.

THOUGHTS ON THE CONSTITUTION OF THE IRISH FREE STATE . 52
Contributed by PROFESSOR J. G. SWIFT MACNEILL, K.C.

THE MEDIÆVAL LAW AND PRACTICE IN REGARD TO ACCOUNTS . 63
Contributed by DAVID MURRAY, ESQ., LL.D., F.S.A.

LAW MAKING BY GOVERNMENT DEPARTMENTS 73
Contributed by SIR LYNDEN MACASSEY, K.B.E., K.C., LL.D.

INTERNATIONAL CRIMINAL LAW 90
Contributed by G. Glover Alexander, ESQ., LL.M.

THE MINISTRY OF LABOUR OF GREAT BRITAIN. I . . . 99

THE INTERNATIONAL STATUS OF THE DOMINIONS . . . 161
Contributed by PROFESSOR A. BERRIEDALE KEITH, D.C.L.

PAGE

THE FUNCTION OF LAW IN SOCIETY 169
Contributed by EDWARD JENKS, ESQ., D.C.L.

FRENCH LAW ON TAXATION OF BETTING 178
Contributed by O. E. BODINGTON, ESQ.

THE ABROGATION OF THE TURKISH CAPITULATIONS . . . 182
Contributed by NORMAN BENTWICH, ESQ., M.C.

THE MINISTRY OF LABOUR OF GREAT BRITAIN. II . . . 189

CITY GOVERNMENT IN THE UNITED STATES 206
Contributed by SIR ALBERT GRAY, K.C.B., K.C.

THE SWISS CIVIL CODE 216
Contributed by ERNEST J. SCHUSTER, ESQ., K.C., LL.D.

THE TENDENCY TO UNIFICATION OF LAW IN THE UNITED STATES, 1868–1922 227
Contributed by J. ARTHUR BARRATT, ESQ., K.C.

THE DEFENCE OF THE REALM LOSSES COMMISSION AND THE WAR COMPENSATION COURT 234
Contributed by D. DU B. DAVIDSON, ESQ.

EUGENICS AND LIMITATION OF MARRIAGE 253
Contributed by J. P. CHAMBERLAIN, ESQ.

THE HAGUE RULES, 1921 258
Contributed by C. R. DUNLOP, ESQ., K.C.

THE MAIN POINTS OF THE DUTCH CRIMINAL AND CIVIL CODES PERTAINING TO MINORS 261
Contributed by DR. VAN HASSELT.

NOTES ON EGYPTIAN LAW 270
Contributed by SIR MALCOLM MCILWRAITH, K.C.M.G., K.C.

NOTES ON IMPERIAL CONSTITUTIONAL LAW . . . 120, 274
Contributed by PROFESSOR A. BERRIEDALE KEITH, D.C.L.

PAGE

NOTES ON INTERNATIONAL LAW:

The Permanent Court of International Justice. JAMES W. GARNER 282
Report of the 31st Conference of the International Law Association. F. N. KEEN 285
The Machinery for Unification of Law. F. N. KEEN . 288
Codification of Private International Law. G. G. PHILLIMORE 289
Laws of War. G. G. PHILLIMORE 290
Revista de Derecho Internacional. WYNDHAM A. BEWES 296
Annuaire International de Législation Agricole. LORD ERNLE. 297
Nationality of Married Women. G. G. PHILLIMORE . 299

NOTES:

The late Sir John Rankine, K.C., LL.D. . . 128
The South African Senate and the Speaker's Conference 130
The Dignity of a Peer 134
The Tunisia Dispute 134
Japanese Bankruptcy Law 136
Institut du Droit Comparé 138
American Journal of International Law . . . 140
A Woman Judge of Ohio's Supreme Court . . . 141
In Memoriam. Dr. Estanislao S. Zeballos . . . 303
The late Charles Thaddeus Terry 304
Law as an Education Study 306
The Nature of Political Thought. 308
The Clause compromisoire 308
Open Price Associations 309
Agricultural Economics 310
The Constitution of Latvia 311
Place of Hindu Law in Comparative Jurisprudence . . 312
French Study of English Law 313
Edward Fry Memorial Library 314
Maintenance Orders 315
Administration of Justice 315

NOTICES OF BOOKS

Stone, Gilbert, *The Mining Laws of the British Empire and Foreign Countries*, vol. iii, The Transvaal. H. T. TAMPLIN 142
Pound, Roscoe, Ph.D., LL.D., *Interpretations of Legal History.* CECIL T. CARR 144
Senior, William, *Doctors' Commons and the Old Court of Admiralty.* G. G. P. 146
Higgins, Henry Bournes, M.A., LL.B., *A New Province for Law and Order.* L. M. 148

PAGE

NOTICES OF BOOKS (*continued*):

Gray, John Chapman, *The Nature and Sources of the Law*, 2nd Ed. J. E. G. de M. 150

Vinogradoff, Sir Paul, *Historical Jurisprudence*, vol. ii. MONICA M. GEIKIE-COBB. 154

Satow, The Right Hon. Sir Ernest, *A Guide to Diplomatic Practice*, 2nd Ed. L. M. 157

Armstrong, J. W. Scobell, *War and Treaty Legislation*, 1914–1922, 2nd Ed. C. M. P. 159

Pollock, The Right Hon. Sir Frederick, *Essays in the Law*. H. J. R. 316

Prize Cases decided in the United States Supreme Court, 1789–1918, Edited by James Brown Scott. C. J. COLOMBOS . 318

Kennedy, W. P. M., *The Constitution of Canada*. A. BERRIEDALE KEITH 321

Keen, F. N., *Towards International Justice*. A. G. . . 322

THE NEW CONSTITUTION OF INDIA.

[*Contributed by* THE RIGHT HON. LORD MESTON, K.C.S.I.]

BY one of the last Acts which Parliament passed in the year 1919 (9 & 10, Geo. V, c. 101), the basis of government in India was radically altered. Previously the administration had been what is popularly called bureaucratic. The legislation of 1919 introduced a democratic element and provided for its gradual expansion towards complete self-government. The Act is a short one of 47 sections; but the change and its possibilities are momentous. To understand them, it is necessary first to compare the legal basis of the old regime with the statutory position to-day, and then to examine the practical working of the governmental machine under the two sets of conditions, past and present. Not being a jurist, the writer cannot attempt to deal with the former part of the inquiry except in general terms; with the latter he is more conversant.

Our system of rule in India rests on a long series of enactments of the British Parliament, supplemented by laws made by subordinate Legislatures in India itself. The law in England was consolidated and harmonized in the Government of India Acts, 1915 and 1916,[1] from which the structure of the administrative hierarchy is readily discernible. At the head of it is the Secretary of State for India, a member of the British Cabinet, and thus responsible to Parliament, and ultimately to the British people, for the exercise of his statutory powers. Those include the right to "superintend, direct and control all acts, operations and concerns which relate to the government or revenues of India." Next in degree comes the Governor-General in Council, in whom is vested "the superintendence, direction and control of the civil and military government of India," and who is required to obey the orders of the Secretary of State. Under the Governor-General are the local Governments of the various Provinces, who must "keep him constantly and diligently informed of [their] proceedings and of all matters which

[1] 5 & 6 Geo. V, c. 61, and 6 & 7 Geo. V, c. 37.

ought in [their] opinion to be reported to him or on which he requires information," and who must obey his orders. Subordinate to the local Governments are the members of the permanent public services, the last link in the chain of authority between the British Parliament and the people of India.

If we concentrate for a moment on that link and take the district officer as typical, and by far the most important, of its administrative units, it is of some interest to estimate the direct influence of Parliament upon his proceedings under the old regime. In theory it was complete. The consolidating Act of 1915 [s. 131 (2)] specifically asserted " the power of Parliament to control the proceedings of the Governor-General in Council, or to repeal or alter any law made by any authority in British India, or to legislate for British India and the inhabitants thereof." In practice this power was sparingly exercised; and both the district officer and his official superiors in India had to turn elsewhere for the details of their authority. They found them, first in canons of administration which have come down from the days of John Company, and secondly, in the laws made by the Indian Legislature and by the more recently created provincial Legislatures. The former source of authority is of greater importance than is commonly realized. In 1858 all extant " orders, regulations and directions lawfully made or given " by the Directors of the East India Company, or by the Board of Control which Pitt set up to watch the Company, were validated; and the Secretary of State was given whatever powers and duties of governing " might or should have been exercised or performed " by the Company or the Board of Control or both. Those provisions still hold, and explain much of the authority of the Indian official for which no other specific enactments can be adduced.

In his second source of authority, the Indian statute book, the district officer had not an inexhaustible fountain. Except in matters judicial, where their work is precise and admirable,[1] the Legislatures in India have not been prolific. This, however, is not so relevant to the present argument as two other features of Indian-made law. One of these is that the Legislatures, with few and inconsiderable exceptions, have been dominated by permanent officials. During the last thirty years there had been a growing infusion of private Indian members into the legislative councils, with an increasing influence and power of criticism; but a govern-

[1] The Indian Penal Code, the Code of Criminal Procedure, and the Evidence Act are legislative monuments of which India has reason to be proud.

ment measure, always in the central Legislature, and as a general rule in the provincial chambers, could command a majority. The last and most notable instance of this was the so-called Rowlatt Act, for dealing with revolutionary crime, which was forced through the central Legislature at Delhi, in the spring of 1919, against the solid opposition of the Indian non-official members. Another peculiarity of Indian-made law is the extent to which it delegates its power of regulation. Executive action is thus dictated and guided, less by the statutes themselves than by codes of statutory rules drawn up by permanent officials.

What has been said of the district officer was true, in considerable measure, of the personnel of the provincial Governments and of those officials of the central Government on whom the Governor-General, usually a stranger to the country, has to rely for advice on details of the administration. The executive business, under the old regime, was thus carried on, nominally under the direction of the British Parliament, in reality with an almost irreducible minimum of intervention from that body. The Secretary of State exercised a critical supervision, varying in its effectiveness with the energy of the individual statesman who happened to be in office, but based as a rule on English principles. The Governor-General, in matters of internal administration, rarely escaped absorption in the local machine. And that machine operated along lines of its own traditions, under statutory authority largely of its own making, and not necessarily in unison with the wishes of the governed people. The position, in other words, was that Parliament had virtually abdicated its power of direction; that the authority to execute the law and, under a thin disguise, the law-making power rested with a highly organized body of salaried permanent officials responsible to the Secretary of State; and that the influence of the people themselves upon their Executive, though steadily growing, had not matured into direct control.

Thus in general terms may be described the system of government which prevailed until two years ago. Whether we label it bureaucratic or autocratic, or by any other equally misleading adjective, is immaterial; it served its time, and Parliament decided to alter it. The theory of the change is set out, at unusual length, in the preamble to the Act. Parliament declares a policy of providing for "the gradual development of self-governing institutions, with a view to the progressive realization of responsible government." The policy, continues the preamble, "can only be achieved

by successive stages," and " the time and manner of each advance can be determined only by Parliament." The first stage is prescribed in detail in the rules made under the Act, approved by Parliament, and brought into effect from the beginning of 1921. An attempt will now be made to outline its main characteristics, and to show in what way, and to what extent, power is given to the people, through their elected representatives, to make laws and to control the Executive.

As a preliminary step, a statutory line of demarcation is drawn between the central field of administration, on the one hand, and the provincial field on the other. The central subjects are specifically catalogued as the business of the central Government, or Governor-General in Council, with his Legislature seated at Simla and Delhi. They include the defence of India and its external relations ; railways, shipping and navigation ; posts and telegraphs ; customs, income-tax, salt and opium ; the public debt, currency and coinage ; the civil and criminal law ; commerce and banking ; and a number of minor activities which cannot conveniently be brought under local control. The remainder of the administrative field is the business of the provincial Governments. For the demarcation thus effected there are two reasons ; one being to delimit the functions of the different Legislatures, the other to pave the way for the larger measure of independence in provincial matters which the preamble of the Act promises to the Provinces and which is sometimes loosely described as provincial autonomy.

In each of the nine major Provinces, defined in the Act as " Governor's provinces," and including Burma (which was at first omitted from the purview of the Act), the new machinery of administration is the same. A single-chamber Legislature has been set up, composed of a small minority of nominated officials and a large majority of members elected by the people of the Province. There are arrangements, with which this sketch need not be encumbered, for the separate representation of minority communities and of special interests ; but, broadly speaking, the constituencies are territorial, and the franchise is low. The Legislature thus constituted is empowered " to make laws for the peace and good government " of the Province, and also to deal with the budget of the Province in detail. On the law-making side certain subjects (including some which are provincial for administrative purposes) are excluded from its jurisdiction, and there are provisions against its clashing with the central Legislature ; but its functions are

roughly co-extensive with the provincial field of administration. On the financial side a number of fixed charges, on the analogy of our Consolidated Fund, are exempt from being voted. But with these reservations the powers of the new provincial Legislatures are considerable and their independence is real. For executive purposes, the public business of the Province is divided into two categories. In one class are the " reserved " subjects, being the work of those departments which are reserved for administration by the Governor and his official Executive Council. In the other are the " transferred " subjects, so called because they belong to those departments which are now transferred to the " administration of the Governor acting with Ministers." At present the reserved subjects embrace the administration of justice, the police and prisons ; the administration of the land laws and the land revenue system ; irrigation and famine relief ; forests, except in Bombay ; provincial loans ; and a number of minor matters. The transferred subjects include education, public health and sanitation, local self-government, public works, excise, agriculture, industries, and all the minor departments which are not reserved.

Appointed by the Crown, the members of a provincial Executive Council are responsible to the central Government, and through it to the Secretary of State and Parliament, for the proper conduct of that field of the provincial administration for which they hold the portfolios. The " superintendence, direction and control " of the Governor-General in Council over them remains unimpaired ; but the corresponding power of the Secretary of State under the former law may now be relaxed by him if his proposals to that end are first approved by resolutions of both Houses of Parliament. In this curious fashion Parliament would curtail its own otherwise unlimited power of intervention ; but its purpose clearly is to retain a residuum of control over the official half of the provincial Government, in view of the fact that it is not wholly amenable to the control of its local Legislature. At the same time, it is perfectly conceivable that the power of that Legislature to make or to refuse laws, or to withhold supply, might prevent the Governor and his Executive Council from discharging their responsibility to Parliament ; and against this contingency special safeguards are provided. If a Bill is passed which conflicts with the duty of the official Executive, the Governor has a general power of veto, and also of holding up the Bill for the Governor-General's orders. If a Bill relating to a reserved subject is rejected, and the Governor certifies that it is

essential for the discharge of his responsibility for the subject, he can make the law on his own authority ; but any law so made has to be submitted for His Majesty's pleasure after being laid before both Houses of Parliament. If supply for a reserved subject is refused, the procedure is simpler, a certificate from the Governor that the expenditure is essential for the discharge of his responsibility being sufficient authority for the appropriation of the necessary funds over the head of the Legislature.

With Ministers the situation is entirely different. In their case the important fact is that they are chosen by the Governor from among the elected members of the Legislature, and their selection implies that they enjoy the confidence of a majority in that body. The Governor has a statutory right to overrule them and, if necessary, to dismiss them ; but it is to the Legislature that they are answerable for the advice they give the Governor, or, in other words, for their conduct of the departments entrusted to them. The Legislature can enforce their responsibility to itself by ordinary constitutional methods : it can declare that they have lost its confidence, it can refuse laws which they ask for, it can withhold supply. In such event there is no remedy corresponding to the exceptional powers enjoyed by the Governor in the case of reserved subjects. The popular assembly has thus an effective control over the administration of the transferred departments. To prevent this from being impaired by the overriding powers of supervision and direction which vest in the Governor-General and in the Secretary of State, statutory rules have been made restricting the exercise of those powers to cases where intervention is necessary to safeguard Imperial interests or the administration of central subjects, to settle disputes between Provinces, or to ensure the fulfilment of duties which the Act itself has specifically imposed.

What has thus been erected in the Provinces is a dual executive government, between the two halves of which the whole area of the provincial administration is apportioned. The official half of the Executive remains, as before, responsible to Parliament, through the Governor-General and the Secretary of State ; but its responsibility is materially curtailed by the practical necessity of showing greater deference than before to the provincial Legislature, on whom it has in normal circumstances to depend for its laws and its finance. The other half of the Executive is, subject to the general guidance of the Governor, responsible entirely to the provincial Legislature and can be compelled to carry out its policy. In so far

then as the Legislature represents the people, there is now an assured measure of direct popular control over certain of the public departments in each Province, and a material degree of indirect popular control or influence over the other departments. In this partitioning of the governmental functions we have the dualism or dyarchy which constitutes one of the most novel, and also most controversial, features of the new scheme. To prevent conflict between the two halves of the Government in matters which concern them both—and in a complex business like public administration there must be many such—the Governor has power to convene meetings of his whole Government for consultation, and to decide, in case of doubt, which half of the Government shall deal with any particular issue. But there must be no confusion of jurisdiction or of responsibility for decisions; for every order of the provincial Government is required to be authenticated as emanating from one or other half of the Government. In this manner will it be possible in future to fasten responsibility for any particular policy or act of State. This last consideration derives importance from the fact that, after ten years of the new regime, a parliamentary commission is to be sent out to inquire into the success or otherwise of its working. The commission's verdict will take the form of advice whether the field of administration by Ministers ought to be altered. From the wording of the Act it is permissible to deduce that, if at this inquest the work of Ministers is not found to have been reasonably satisfactory, Parliament may direct departments which are now transferred to become reserved. If, on the other hand, the conclusion is that the experiment has been justified, its field will be extended by the transfer of departments which are now reserved; and presumably, by the renewal of this process at periods approved by Parliament, the control of provincial subjects will in time pass entirely into the hands of Ministers deriving their authority from an elected Legislature.

Space will not permit of an examination of the considerable volume of statutory rules which have been already framed under the Act of 1919 to facilitate the working of the machinery outlined above. One point, however, deserves notice in passing. During the construction of the scheme it was anticipated that difficulties might arise over the preparation of the provincial budget. Each half of the dual Government, it was expected, would naturally attempt to obtain, for the service of its own departments, as large a share as

possible of the revenues which they jointly contribute to the general exchequer, and it was feared that the scramble might generate serious friction. The ordinary method of settlement by Cabinet consultation might avail, as each section of the Executive had, in the last resort, a different power to rely upon in support of its claims. In view of this danger a special regulation had been made that, if the two halves of his Government cannot agree on the apportionment of the revenue between their respective services, the Governor " may by order in writing allocate the revenues and balances of the Province between reserved and transferred subjects, by specifying the fractional proportions of the revenues and balances which shall be assigned to each class of subject." If he wishes assistance in this delicate task, the Governor may ask the Governor-General to appoint an independent authority to report to and advise him.

Thus far we have considered the mechanism of the new provincial Governments. The method by which popular control is introduced into the central Government is different ; and also less unfamiliar in the history of constitutional development, being analogous to the " representative government " stage in the growth of most of our Dominions.[1] The Legislature consists of two Chambers, the Legislative Assembly and the Council of State. The former is a body of 140 members, of whom 100 are elected, and not more than 26 may be permanent officials. The elections are by constituencies, partly territorial and partly communal, into which the whole of British India is divided, and on a franchise which differs in the various Provinces but is everywhere easy. The strength of the Upper Chamber is 60, of whom 33 are elected, and not more than 20 may be permanent officials. The constituencies are similar in character to, but of course much larger than, those for the lower Chamber ; but the franchise embraces both property qualifications of a relatively high standard and personal qualifications which connote administrative experience or distinction in the spheres of education or commerce.

The jurisdiction of the " Indian Legislature," as it is technically described, has always been defined with much care, so as for example to exclude power to interfere with the Secretary of State's statutory borrowings in England, or with the existence of the High Courts in India, or with Acts of Parliament on Indian affairs passed after 1860.

[1] This was brought out by Mr. R. Feetham, K.C., in an article for this *Journal* in January 1921.

But its law-making powers were formerly concurrent with those of the provincial Legislatures, and the new Act alters this by requiring the previous sanction of the Governor-General before it can entertain any measure regulating a provincial subject, unless such subject is specifically reserved for central legislation, or repealing or amending any Act of a provincial Legislature. Apart from these restrictions, the normal procedure is that a Bill may originate in either Chamber and, to become law, it must pass both Chambers. In the event of disagreement between the two, a conference may be held to discuss the matters at issue ; but if the differences cannot be thus reconciled, the Governor-General has an ultimate discretionary power of convening a joint sitting of the Assembly and the Council, at which all votes are equal. By this body the disputed Bill may be discussed and amended and either rejected or passed into law without more ado. The Budget has to be laid before both Chambers ; but the power of accepting, modifying or refusing the grants rests with the Assembly alone, and it does not extend to the service of the public debt, to military, political or ecclesiastical expenditure, and to certain other fixed charges.

Formidable as may appear the list of reservations to the powers, law-making and financial, of the central Legislature, its control over the administrative sphere of the central Government is wide and effective. But there is no corresponding extension of popular control into the Executive. That body consists, as before, of the Governor-General and his Council ; and though the latter has been slightly enlarged so as to admit a more generous ingredient of Indian members, the councillors are all appointed by the Crown and are responsible (as is the Governor-General) to Parliament—and not to the Indian Legislature—for the proper discharge of their duties. In order to ensure the performance of those duties where they clash with the will of the Legislature, the Governor-General is armed with exceptional powers similar to those which Governors of Provinces enjoy in regard to reserved provincial subjects. Should he require a legislative measure which he certifies as " essential for the safety, tranquillity or interests of British India or any part thereof," and should either Chamber reject or mangle it, he may take it to the other Chamber. If the latter accepts it (or has already accepted it), the Bill forthwith becomes an Act; but if both Chambers prove recusant, the Governor-General may make it an Act by his own fiat. Unless, however, emergency demands the law to become immediately operative, every Act made in this way has to be laid

before both Houses of Parliament before it is submitted for His Majesty's assent. In the contrary case of either Chamber entertaining a Bill or an amendment which the Governor-General certifies as affecting " the safety or tranquillity of British India or any part thereof," he may stop proceedings. If the Assembly has reduced or refused any grant asked for in the Budget, it is in the discretion of the Governor-General in Council to treat the grant as having been assented to, if " he declares that he is satisfied that [it] is essential to the discharge of his responsibilities."

We return now to the apex of the governmental hierarchy, the Secretary of State. Apart from some minor changes in the emoluments and procedure of his Council, the new Act touches him at only two points. In the first place, it puts his salary on the British, instead of on the Indian, estimates, thus giving Parliament a direct opportunity of discussing his conduct of Indian affairs, and expressing its approval or otherwise. In the second place, it authorizes him to divest himself of any part of the universal power of supervision and control with which his office has always been endowed. All proposals made by him to this end have to take the form of rules to be laid before both Houses of Parliament. Here, however, there is a significant discrimination. When the Secretary of State proposes to forgo his power of interference with the work of Ministers, the tacit assent of Parliament is sufficient, and it requires an address to His Majesty to get the rules cancelled or altered. But where the Secretary of State proposes to emancipate an official Executive—whether that of the central Government or that of the Governor in Council—his rules must go to Parliament in draft, and do not become valid until both Houses have passed resolutions approving them. In this curious roundabout fashion Parliament expresses its intention of relaxing its control over the new administrations ; and also indicates its special readiness to confer independence on the authorities entrusted with the transferred subjects.

This completes a summary, from which many not unimportant details have necessarily been omitted, of the formal structure of the new system of government in India. In a scheme which comprises so much that is novel and experimental, the only real criterion of success or failure is the result of its practical working. This we are not yet in a position to estimate. The new conditions have been in operation for barely two years. They have been obscured from the start by a widespread agitation among one political section —the non-co-operationists, or extremists—directed at wrecking

the experiment by making the whole system impossible. And all public business has been severely hampered by grave financial stringency; Ministers have been prevented by the shortage of funds from embarking on developments in their own departments to which they had looked forward as the first-fruits of their new powers, and the energies of the popular assemblies have been in a measure diverted to challenging the cost, and consequently the administrative methods, of the spending departments which they do not control. Racial sensibilities have been acute, and the official section of the Government has frequently had to waive its rights in order to avoid friction which might overstrain the new machinery. Hardly could a new Constitution have started in less favouring circumstances. Time and a quieter atmosphere are needed to let it settle down, and any forecast of the parliamentary commission's verdict seven years hence would be valueless. Certain indications, however, can be gleaned of the special problems which attend the unfolding of the new system, and the more obvious dangers that will have to be combated.

In the provinces the outstanding problem is the harmonizing of a Government composed of two sections which are neither required by law or usage, nor impelled by a sense of common responsibility, to adopt a common policy. Administration has been described as a seamless garment which cannot be divided without rending it; and assuredly every Indian administrator knows that the public departments are far from being water-tight, their interests and reactions constantly flowing from one into another. Under the old regime it was often hard enough to keep the activities of different departments from clashing, even with the undivided power of the Government to direct them all, and the practically unquestioned authority of the district officer to interpret their policy to the people. How much greater must be the difficulty, and how much more frequent in its occurrence, when the Government is shared by two authorities, whose mandates come from totally separate sources, and whose policy may be inspired by divergent ideals. If the reconciling, non-statutory, paternal, illogical power of the district officer were intact, the point might not be of so much importance. But the rôle of that official is not what it was. He has to carry out, with equal loyalty, the orders of two masters; and he has to help to make the people realize that, in the transferred departments, they must no longer turn to him with their troubles, but rely on their own competence as voters to influence the Legislature and the Ministers.

The difficulty is thus a real one. It is not one from which the framers of the Constitution tried to run away. Their recognition of the dilemma and their remedy for it are succinctly expressed in two paragraphs of the Instrument of Instructions which is issued by the Crown to each provincial Governor:

III. Inasmuch as certain matters have been reserved for the administration according to law of the Governor in Council, in respect of which the authority of our Governor-General in Council shall remain unimpaired, while certain other matters have been transferred to the administration of the Governor acting with a Minister, it will be for you so to regulate the business of the government of the Province that, so far as may be possible, the responsibility for each of these respective classes of matters may be kept clear and distinct.

IV. Nevertheless, you shall encourage the habit of joint deliberation between yourself, your Councillors and your Ministers, in order that the experience of your official advisers may be at the disposal of your Ministers, and that the knowledge of your Ministers as to the wishes of the people may be at the disposal of your Councillors.

In the daily round of the administration, it is the Governor's duty to keep himself informed of all the more important business transacted by his Councillors on the one hand and his Ministers on the other. When he finds one side of his Government embarking on a project which has reactions in departments on the other side, or when a question of special moment or of controversial character arises on either side, it is expected of him that he will call his Councillors and Ministers together, to discuss the matter jointly and informally. With the issues argued from every point of view, and under the moderating influence of the Governor, much may be done to avoid conflict of opinion and to secure for the Executive a united front *vis-à-vis* the Legislature. Should neither persuasion, however, nor compromise avail, the question has to go back to the Council or the Ministers, as the case may be, for the actual decision to be taken in the department in which the issue arose; and in the event of doubt or dispute as to jurisdiction, the Governor has to decide which department will dispose of the matter. The essential point is that there shall be free discussion between the two halves of the Government on all questions of general public interest, and that such discussion shall not obscure the responsibility for the ultimate decision. Once an issue returns to its own department for settlement, it becomes the business exclusively of the Governor in Couucil, or of the Governor with his Ministers, as the case may be, and their

separate liability is in no way merged by the fact that there has been preliminary consultation between the two.

Let us suppose that the issue is whether or not to pursue a particular project in regard to which opinion is sharply divided between the official half and the popular half of the Government. In strict theory, the following is the procedure for disposing of the question after the joint deliberations of the whole Government have failed to secure unanimity. Should the project belong to a reserved department, it will come before the Governor in Council, who will decide on it in the ordinary way by a majority vote. They determine, let us say, to proceed with the project. It may be that the Governor has been so impressed by the previous consultation with Ministers that he believes it would be in the best interest of the Province to drop the matter; if so, he can overrule his Council, and the project is dropped accordingly. If, however, he accepts the view of his Council, the decision to proceed with the scheme is promulgated. Legislation, if necessary, is asked for by the official representatives on the Legislative Council; the Ministers, if they are unable to support the proposal, at least refrain from speaking and voting against it. If the Legislature reject the proposal, the Governor can make the law which he requires, under the special procedure indicated above; and the whole responsibility for the policy rests on him and his Council. Let us now take the converse position. The scheme belongs to a transferred department; Ministers are pressing for it, and the official advisers of the Governor are hostile. After the abortive conference, Ministers are left to decide the issue. Should they determine to push on with the project, they advise the Governor accordingly; and, unless he rejects their advice—which he would not do except for some unusually strong reason of public policy—the decision of the Government to go forward with the scheme is duly announced. When legislation is asked for, it will be the Ministers who will defend it, the official Councillors remaining neutral if they cannot support. If the Legislature endorses the Ministers' action, there is nothing more to be said; if it takes a contrary view, Ministers have the responsibility of failure, and the Governor may in his discretion ask them to resign.

There are of course a number of permutations in the hypothetical case of a divergence of views between the two sides of the dual Government. But the foregoing may sufficiently exemplify the lines on which the authors of dyarchy expected it to work in practice.

Unfortunately its symmetry has not been completely observed. There have been difficulties with Ministers, who have not in all cases the desired backing in the Legislative Councils; for no stable party system has yet been evolved. There have been difficulties with the Legislatures, which have shown a tendency to ignore the line of demarcation between reserved and transferred subjects. The cry has been raised for a speedier transference of power to the people's representatives, and there have been outbreaks of petulance against the ten-year period of probation. Politicians whose natural inclination is towards moderate counsels have been urged by extremist pressure to pose as champions of more rapid progress; and the solid humdrum task of learning the business of administration in the transferred field has been somewhat neglected. In some instances the official Governments have found it expedient to make concessions to the spirit of impatience, and they have not always asserted principles which might well be regarded as essential to the proper conduct of the departments left in their charge. And one or two Governors, whose adhesion to dyarchy was never whole-hearted, have been experimenting on lines which to the outside observer seem to be leading in the direction of a unified Government, with their Councillors and their Ministers jointly responsible for the whole field of provincial administration. In these various ways it may be apprehended that the clear-cut division of duties and fixation of responsibility at which dyarchy aimed may not be sufficiently maintained to furnish the statutory Commission seven years hence with unimpeachable material for a decision on the success or otherwise of the system as originally conceived by Parliament. The times, however, have been exceptionally unsettled; and a calmer environment in the later part of the probationary decade may allow of the machinery being worked in closer accord with both the letter and the spirit of the new Constitution.

From the difficulties and dangers of dualism the central Government, to which we may now turn, is free. But it has its own problem, the problem of what has been described as "an irremovable executive and an irresponsible Legislature." Dyarchy was not imported into the central Executive, because it was felt that the time was not ripe for handing over to inexperienced popular control any of the departments which are concerned with the safety of India, its external relations and its mercantile development. Constitutional progress, however, it was considered, would be inadequate if it was confined to the Provinces; and so it was decided to make the central

Government more responsive to the declared wishes of the people. The impossible position of an Executive which the Legislature cannot remove, but can paralyse by refusing laws and withholding supply, was foreseen : indeed, it had been condemned as the fatal defect of most of the schemes of reform which were put forward by Indian politicians before Mr. Montagu's visit in 1917. To correct it, the bicameral Legislature was devised, and the Governor-General was armed with the special overriding powers which have been sketched above. In the Council of the State the more stable and experienced elements of Indian society were to counterbalance any extravagances of the lower Chamber ; and the exceptional privilege of the Viceroy was to be exercised without hesitation whenever necessary for good government. In some measure these safeguards have not fulfilled expectations. The Council of State has been relegated to a secondary position by the more popular and active Assembly ; and joint sittings, as a mere count of heads would show, are unlikely to help the Executive in carrying through any measure against which Indian feeling has been definitely organized. The overriding powers of the Governor-General have only once, it is understood, been employed by him ; and the Executive have frequently had to temporize in matters which they presumably regarded as of first importance. They found it dangerous, or at least, at the inception of the new Constitution, highly inexpedient to resist popular opinion strongly voiced in the Legislative Assembly, and probably carried into the Viceroy's Cabinet by the Indian political leaders who are now appointed as a minority, though not an ineffective minority, in his Council.

It would be unflattering to the perspicacity of the authors of the Constitution to assume that much of this was not in their minds. The underlying object of the new framework for the central Government was unquestionably to accustom the official Executive to rely less on the control and backing of the Secretary of State, and more on the support and advice of their own Legislature. On them in this way would be brought to bear popular influence, to a degree which there had been formerly a tendency to resist. The result has certainly been attained ; and indeed at times the new influence has reached a point which can hardly be distinguished from control. If, however, the change has gone further than was designed, much must be ascribed, as in the corresponding movement in the Provinces, to the disturbance which followed the first inrush of freedom and the first taste of power. At many a juncture would it have

been easy for Lord Reading to enforce a crisis; it would have been foolish unless he was prepared to see it out to its logical end, which might have been the suspension of the Constitution, and so drastic a step would clearly have been calamitous at this early stage in its history. Arguments of expediency, however, cannot prevail indefinitely; and it may be desirable for Parliament to exercise some of its supervising authority to ensure that there is no undue encroachment upon the duties with which the Governor-General in Council is entrusted. For any necessary vigilance in this respect Parliament has, besides the Secretary of State, an agency peculiarly its own in the Standing Committee of both Houses which was recently set up to advise on Indian affairs.

It cannot, of course, be expected that the new Constitution will develop exactly according to pattern and design. No Constitution has ever done so. The best that can be hoped is that in time a national Government will evolve, in which, at least during its earlier stages, Englishmen and Indians can co-operate, and which will pursue a policy acceptable to enlightened Indian opinion, and yet compatible with the position of India, in the words of the preamble of the Act, " as an integral part of the Empire."

THE DECISIONS OF THE ANGLO-GERMAN MIXED ARBITRAL TRIBUNAL.

[*Contributed by* EVERARD DICKSON, ESQ.]

THE Treaty of Versailles was carried into effect in Great Britain and Ireland by the Treaty of Peace Act, 1919, which empowered His Majesty to make such appointments, establish such offices, make such Orders in Council and do such things as appeared to him to be necessary for carrying out the Treaty. Pursuant to the Act, an Order in Council, entitled the Treaty of Peace Order, 1919,[1] was made at the Court at Buckingham Palace on August 18. The Order recited briefly the provisions of the Act, and that the Treaty contained the Sections set out in the schedule to the Order.

S. 1 of the Order, as originally promulgated, was framed in the following terms :

" The sections of the Treaty set out in the Schedule *to this Act* shall have full force and effect as law, and for the purpose of carrying out the said sections the following provisions shall have effect, etc."

The use of the word " Act " was manifestly the result of a drafting or clerical error, which was corrected by the Treaty of Peace (Amendment) Order, 1919,[2] which substituted for it the word " Order."

In a schedule to the Order are set out Sections III, IV, V, VI, and VII, Part X, of the Treaty, the sections to which the Treaty of Peace Order applies. In Section VI is to be found Article 304, and the first part of par. (*a*) of this Article provides as follows :

Within three months from the date of the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand, and Germany on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments.

[1] *Statutory Rules and Orders*, 1919, No. 1517.
[2] *Statutory Rules and Orders*, 1920, No. 1410.

Under the provisions of this Article the Anglo-German Mixed Arbitral Tribunal came into existence. Mr. R. E. L. Vaughan Williams, K.C., was appointed British member by the British Government, Dr. jur. A. N. Zacharias, Senats Präsident of the Hanseatic Oberlandsgericht, was appointed by the German Government, and M. Eugène Borel, professor of the faculty of law at the University of Geneva, a noted Swiss jurist, was chosen as President. Pursuant to par. 5 of the Annex to Section VI the British Government appointed Mr. Harold Russell as Secretary, and the German Government Dr. Hesse, and, with these two gentlemen as joint secretaries, the Secretariat was opened at 21, St. James's Square, in November 1920. The Tribunal sat for the first time in January 1921.

Jurisdiction.—Article 304 (*b*) of the Treaty prescribed the matters within the jurisdiction of the Mixed Arbitral Tribunals in these terms :

> The Mixed Arbitral Tribunal established pursuant to par. (*a*) shall decide all questions within their competence under Sections III, IV, V, and VII.

In addition, all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the Treaty between nationals of the Allied and Associated Powers on the one hand, and German nationals on the other, fall within the jurisdiction of the Tribunal. From this are excluded questions which, under the laws of Allied, Associated or Neutral Powers, are within the jurisdiction of the National Courts of those Powers. Nevertheless, if he is not prohibited by the laws of his own country, a national of an Allied or Associated Power may, at his option, bring the case before the Tribunal. (Article 304 (*b*) second sub-par.)

The Tribunal discussed their jurisdiction in their decision of Claim No. 131, *Norddeutsche Bank* v. *The Board of Trade, and the Public Trustee*.[1] In this case the Tribunal expressed the opinion that the jurisdiction did not extend to all the provisions, whatsoever their purport, contained in Sections III, IV, V, and VII of Part X of the Treaty. The Mixed Arbitral Tribunal is expressly mentioned

[1] Important decisions of the Mixed Arbitral Tribunals are to be found in the *Recueil des Décisions des Tribunaux Arbitraux Mixtes* published by the Librairie de la Société Sirey, 22 Rue Soufflot, Paris, 5e Arr. The Secretariat of the Anglo-German Mixed Arbitral Tribunal have arranged, by courtesy of the Librarian of the Bar Library and of the Law Society for copies of the decisions of the Tribunal to be available for inspection at these two libraries. This case is not yet reported in the *Recueil des Décisions.*

in this Part of the Treaty in connection with certain matters. As to these matters the Treaty expressly establishes its jurisdiction. Beyond these matters the jurisdiction of the Tribunal extends only to questions covered by such further provisions as relate directly, or give to questions related directly to those establishing their jurisdiction. The jurisdiction of the Tribunal therefore extends to the matters set out below, which are " within their competence."

Debts.—Under par. 16 of the Annex to Section III, Part X, disputes as to debts fall within the Tribunal's jurisdiction. It is scarcely necessary to explain that the Treaty provided for the settlement through Clearing Offices [1] established by each of the High Contracting Parties of certain classes of pecuniary obligations. The most important of these are :

(*a*) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an opposing Power residing within its territory (Article 296, 1).

(*b*) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an opposing Power resident within its territory, of which the total or partial execution was suspended on account of the declaration of war. (Article 296, 2.)

There are two other classes of pecuniary obligation, which, for the purposes of the operation of the Clearing Office system, are also described as " debts." These are the capital or interest payable, before and during the war, to the national of one of the High Contracting Parties, in respect of securities issued by an opposing Power (Article 296, 3 and 4). Disputes, referable to the Tribunal, arise when the two Clearing Offices are unable to agree whether a debt claimed is due, or when there is a difference between the Clearing Offices, or between an enemy creditor and an enemy debtor (Par. 16, Annex to Section III, Part X).

It is proposed to refer to some of the more important decisions of the Tribunal, relating not only to enemy debts, but also, in the proper places, to the other subjects of the Tribunal's jurisdiction. But before doing so it is necessary to publish a word of warning. The Tribunal has declared that, having regard to the nature of its task, and its position as a final Arbitral Court created by

[1] Any Allied or Associated Power had the option of not adopting the Clearing Office procedure (Article 296 (*e*)). For full information as to the operation of the Clearing-office procedure, reference should be made to the annual reports of the Controller of the Clearing Office, published by H.M. Stationery Office.

the Peace Treaty, it cannot regard a decision given by it in a case as unreservedly binding upon it in all future cases. A party may ask the Tribunal to reconsider a legal question, on which a former decision has been founded (*Gunn* v. *Gunz*, Nos. 15–16–17, *Recueil des Décisions*, at p. 203).

The Tribunal has determined that in giving effect to Article 196, the date at which the parties were to be " residing within the territory " of their State was January 10, 1920, the day on which the Treaty came into force (*Kohn & Goldschmidt* v. *Oppenheimer & Shwabacher*, Nos. 15–16–17, *Recueil des Décisions*, p. 211). The question of the nationality of the creditor arose in Case No. 297, *Hein* v. *Hildesheimer Bank* (No. 14, *Recueil des Décisions*, p. 71). The creditor, who was of German birth, took out a British certificate of naturalization in the month of February 1901. The certificate contained a reservation to the effect that, within the limits of the foreign State, being his country of origin, the holder was not to be deemed a British subject. He took out a " Heimatsschein," or certificate allowing him to be absent from Germany for a period of five years from December 21, 1905, to December 21, 1910. According to the former German law[1] it was necessary that a person be absent from Germany without leave for a period of ten years before he can divest himself finally of German nationality. Therefore on the critical date, January 10, 1920, the creditor remained invested with dual nationality.[2] The Tribunal held that this was immaterial, for whether he had or had not lost his German nationality, he had gained British nationality and was at the proper time resident in British territory. A formal decision has been given in a case in which the creditors were two Ukrainians who carried on business in partnership (Offene Handelsgesellschaft) in Leipzig, to the effect that their claim did not come within Article 296 of the Treaty, as no member of the partnership was of German nationality. (*Hyman* v. *Wydra und Soehne*, No. 5, *Recueil des Décisions*, p. 291.)

None of the questions arising in cases in which members of a partnership are not of the same nationality has yet been determined. As to a limited company, it was decided in the case of *Chamberlain and Hookham, Limited* v. *Solar Zahlerwerke, G.m.b.H.* (No. 11,

[1] Gesetz über die Erwerbung und der Verlust der Reichs- und Staatsangehörigkeit vom June 1, 1870.

[2] The operation of Article 278 may have been sufficient to divest him of his Germany nationality, but as to this no opinion is expressed.

Recueil des Décisions, p. 722) that a company, of which all the shareholders were British, and which was created and directed by Chamberlain and Hookham, Limited (a British company), but which was incorporated under German law, and had its seat in German territory, must be considered a German national within the meaning of Article 296. This decision has been followed by the Tribunal in other similar cases.

Nominally most of the cases which come before the Tribunal under these provisions are between the nationals of the two Powers. In practice, however, the German Government is the most interested party, for, by virtue of German legislation,[1] debts falling within the provisions of the Treaty, and due by a German debtor, are discharged by the debtor by a payment to the German Clearing Office based on the amount of the debt in marks, without regard to the depreciation of the currency.[2] Consequently, the German Government has undertaken spontaneously, on behalf of its nationals, in this respect practically the whole of the burden resulting from the depreciation of the mark, for, under Article 296 (*d*), debts are to be paid or credited in the currency of the Allied and Associated Powers concerned. If the debt is payable in some other currency it has to be valorized at the pre-war rate of exchange.

Article 296 (*h*) makes each Power responsible for the payment of debts due by its nationals, but the Powers are given relief from their guarantee, firstly in cases in which the debtor was before the war in a state of bankruptcy, or failure, or had given formal indication of solvency, or, secondly, where the debt was due by a company whose business had been liquidated under emergency legislation during the war (Article 296 (*b*) and par. 4 of the Annex to Section III, Part X.).

The Tribunal discussed the former contingency entitling a Power to be relieved of its guarantee in *Seligman* v. *Von Liebermann* (No. 11 *Recueil des Décisions*, p. 730). The Tribunal then expressed the opinion that the three different situations specified by the Treaty, viz. "bankruptcy," "failure," "formal indication of insolvency," involve in all cases an official statement of the insolvency of the debtor before the outbreak of war. The Tribunal have followed this in other cases, notably *Delius* v. *The German Govern-*

[1] Imperial Clearing Law of April 24, 1920.

[2] See the provisions of Article 29 to prevent a profit accruing to a German who is both a creditor and a debtor.

ment (Nos. 15–16–17, *Recueil des Décisions*, p. 213), and *Ladenburg* v. *Weingart* (Nos. 15–16–17, *Recueil des Décisions*, p. 196).

Interest is payable on all debts, and the rate is fixed at 5 per cent. per annum except in cases in which by contract, law, or custom, the creditor is entitled to payment of interest at a different rate. Further, interest is not payable on sums due by way of dividend, interest, or other periodical payments which themselves represent interest on capital (par. 22, Annex to Section III, Part X.). In *Schanck & Co.* v. *Emil Kummerle* (No. 12, *Recueil des Décisions*, p. 854) the facts disclosed that, prior to the outbreak of war, under a contract existing between the parties, the debtor was obliged to pay interest on the balance owed, for the time being, by him to the creditors, at the rate of 5 per cent., per annum compound interest calculated with half-yearly rests. By virtue of the provisions of Article 299, the contract must be regarded as having been dissolved at the outbreak of the war. The Tribunal disallowed the claim of the creditors for the difference between compound interest and simple interest, which, together with the capital sum due on the outbreak of war, had been admitted by the debtor through the German Clearing Office. The contention put forward by the creditors was that the contract for compound interest was virtually one for a higher rate than 5 per cent. The Tribunal, however, took the view that the stipulation for compound interest related not to the rate of interest, but to the sum on which the interest at the contractual rate was to be calculated.

A point of difficulty was recently before the Tribunal in connection with the question of interest. When the war broke out between Great Britain and Germany there were in progress on the London Stock Exchange a great number of bargains between brokers and German clients which were being "carried over." Shares which are dealt with in this way are not taken up and paid for by the buyer. The original purchase price is found by the broker, and the stocks are twice a month "contangoed" or sold for the immediate account, and repurchased for the new account at the official making-up price. The differences accruing are credited or debited, as the case may be, to the client, who, from time to time, remits to the broker, or receives from him, the sum which, on the one side or the other, is due. For carrying through these transactions the broker receives a remuneration called "contango," which consists of a small percentage on the making-up price of the stock. In cases in which the broker has had to borrow the money for the purchase

of the stock, a small commission is added.[1] The balance carried forward each fortnight, in the cases in question, included the contango for the previous fortnight. Further, when the accounts were finally closed, a large proportion of the balance was made up of contango charges. The creditors, in the cases before the Tribunal, had charged interest on this balance from the date of the closing. For the German debtors it was contended that contango was itself interest, that by reason of the provisions of the Treaty referred to above, it could neither be included in the amount on which the succeeding fortnight's contango was calculated, nor would interest be admissible on so much of the balance as was itself represented by contango. The Tribunal were of opinion that contango was not interest, but represented the broker's remuneration, and they found in favour of the creditors. (Case 317, *J. Stamm & Co.* v. *Frochlied und Liebmann*—unreported.)

A legacy under a will has been held by the Tribunal not to be a debt arising out of a transaction, and not to fall within the provisions of Article 296. Consequently a legatee did not receive his legacy at the pre-war rate of exchange. (*Leon Benvenisti* v. *Carl Furstenburg* (No. 15–16–17 *Recueil des Décisions*, p. 190.)

In *The Zinc Corporation Limited* v. *Aron Hirsch & Sons* (No. 6–7, *Recueil des Décisions*, p. 314) the creditors sought to recover as a debt the amount found due to them from the debtors in the judgment of a judge of the Supreme Court of Victoria, during the course of the war. The debtors were represented at the trial, they appealed unsuccessfully to the High Court of Australia, and they applied unsuccessfully to the Judicial Committee of the Privy Council for leave to appeal against the judgment of the High Court of Australia. The Tribunal decided that in the circumstances of the particular case the debtors had not submitted without reserve to the jurisdiction of the Victorian Court. They accordingly decided that the amount awarded by the judgment did not constitute a debt under Article 296 and that the judgment was not conclusive in favour of the creditors. The Tribunal did not express any opinion as to what the position would have been if the debtors had submitted without reserve to the jurisdiction of the British Court.

By virtue of Article 299 (*a*) any contract[2] concluded between

[1] For a lucid exposition of these transactions, see Schwabe and Branson's *Laws of the Stock Exchange* (2nd edition), p. 66.

[2] This is subject to the exceptions in the Article, and to the provisions of the Annex to Section V, Part X of the Treaty. See *infra*.

enemies is regarded as having been dissolved as from the time when any two of the parties thereto became enemies, except in respect of any debt, or other pecuniary obligation arising out of any act done or money paid thereunder. Difficulties have arisen in cases in which, by reason of the nature of the contractual relationship, or of the subject matter of the contract, one party or the other continued to perform acts under the contract. Such a position was exemplified in Case No. 202 *Arbib* v. *Hartz* (unreported). The debtor was the manager of the Berlin branch of a business, in which the creditors were interested as the executors under the will of the late owner, who had died during the war. The debtor continued to conduct the business " so as to save as much as possible." Again, in Case No. 409, *Schuster & Co.* v. *Deutsche Bank* (unreported), the debtors held certain bearer shares in Germany for the creditors. In 1917 the holders of these shares became entitled to certain rights of subscription. The bank could not communicate with the creditors, but sold the rights of subscription, so filling spontaneously an obligation implied in their contractual relationship. In Case No. 38 *Herold & Co.* v. *Carl Cahn and the German Clearing Office* (unreported) the parties had engaged in arbitrage transactions on the London Stock Exchange and the Berlin Börse for joint account. When the war broke out certain transactions had not been completed by the delivery of the stock. This had been purchased in London by the creditors, and an equivalent amount had been sold in Berlin by the debtor. The war made it impossible to deliver the stock. The debtor thereupon " took in " or borrowed equivalent stock in Berlin for delivery to the purchaser. The creditor in London took up the securities and pledged them with a bank and borrowed money. This situation continued throughout the war, and so each party was involved in the quandary of having in his control certain of the fruits of the transaction, but of being compelled, on the other hand, to incur expenditure. Or again, in the cases in which the outbreak of war interrupted the continuation of transactions on the Stock Exchange already referred to, and the broker was left in the position of having undertaken on the Stock Exchange liabilities on behalf of his client, which he had to meet, but in respect of which he could not be reimbursed. In certain of these cases it was suggested that there was an obligation on the broker to see when the making-up price of July 27 was reached.

Generally speaking, in all cases like the instances above referred to, in which the parties were placed in a situation of difficulty, the

Tribunal has determined questions arising out of their dealings after the outbreak of war by considering whether the parties have done what they considered best in the circumstances, each party having regard to the interests of the other. The Tribunal will not consider whether, in the light of what is now known, a party might have acted more prudently. It has expressed the opinion that a party ought not to have indulged in a new speculation. Case No. 414 (*Stamm & Co.* v. *Klettwig und Reibstein*—unreported).

In *Kitzinger* v. *Dann* (No 52, *Recueil des Décisions*, p. 847) the Tribunal decided that by reason of the operation of Article 299 (*a*) a loan, the maturity of which for repayment, in the ordinary case under German law, would have depended on three months' notice, became immediately repayable on the outbreak of the war. In *Gunn* v. *Gunz* (Nos. 15–16–17, *Recueil des Décisions*, p. 200) they decided, in a case in which the contract provided for repayment of a loan on certain dates, beginning in July 1916, that the effect of its dissolution under Article 299 (*a*) was to make the debt payable without notice, according to the terms of, and at the dates stipulated by, the contract.

These two cases related to loans. In Case No. 465 *In re Public Trustee* v. *Endersche Erben* (unreported) the loan was secured by mortgage. Par. 2 of the Annex to Section V, Part X, provides that certain enumerated classes of contracts are exempted from dissolution, subject (*inter alia*) to the application of domestic laws, orders, or regulations made during the war by the Allied and Associated Powers. Amongst these contracts are contracts of mortgage, pledge, or lien. Under German law[1] repayment could be claimed only on the expiry of three months' notice. The Tribunal took the view that the contract of mortgage was ancillary to the existence of the debt it guaranteed. The provisions of the Treaty which saved the contract of mortgage from dissolution, the Tribunal interpreted to apply, independently of the contract of loan. If the dissolution of the contract of loan leads to the total or partial repayment of the debt, the effect of the repayment on the mortgage is to be determined according to the law applicable.

Two decisions of the Tribunal have established that the drawers of bills of exchange are obliged to indemnify the accepting houses for all charges reasonably incurred by them through the failure

[1] S. 609 des Bürgerlichen Gesetzbuches.

of the drawers, due to the outbreak of war, to put the accepting houses in funds in order to meet their liablities (*Huth & Co.* v. *Fahr und Setzer*, No. 5, *Recueil des Décisions*, p. 286. *Fruhling und Goschen* v. *Breyer*, No. 12, *Recueil des Décisions*, p. 860. See par. 7 of the Annex to Section V, Part X of the Treaty).

It is convenient to mention at this point two important decisions of Clearing Office cases relating to the liquidation of German property in the United Kingdom and affecting the charge on German property in the United Kingdom permitted by par. 4 of the Annex to Section IV, Part X, of the Treaty, and created by the Treaty of Peace Order, 1919, s. 1 (xvi). In the first, *In re Brandt* v. *Tillman* (Nos. 9–10, *Recueil de Décisions*, p. 554) the debtor, a German national, had deposited with a British creditor, as security for a debt, certain securities. The creditor notified the debt, which was admitted by the debtor in full, but the German Clearing Office contested the debt unless and until the securities were handed over. The British Clearing Office claimed that the securities, when freed of the rights of the creditor, still remained liable to the right of the British Government to retain them under Article 297 (*b*). The Tribunal decided that the German Clearing Office had no right to demand either that the securities be handed over or that, as between the two Clearing Offices, the debt be reduced by their value. In the second case, *In re Ripley & Co.* v. *Schlechtendahl* (Nos. 15–16–17, *Recueil des Décisions*), it was decided that the German Clearing Office were not entitled to require the payment of a debt due by a German firm, contracted by their branch business in England, out of the proceeds of the liquidation of the branch business. Such a debt, the Tribunal decided, was payable only through the Clearing Offices, under Article 296 of the Treaty.

Property, Rights and Interests.—The second task which the Treaty [1] imposes upon the Tribunal is that of investigating the claims of British nationals, and determining the compensation they are to receive in respect of damage or injury to their property, rights and interests in German territory as it existed on August 1, 1914, by the application of exceptional war measures, or measures of transfer. These exceptional war measures, or measures of transfer, are detailed in pars. 1 and 3 to the Annex to Section IV, Part X. The most simple case coming before the Tribunal under this Article is that in which a German debtor has, in the course of the war, and in accordance with German legislation, paid to the Treuhänder für das

[1] Article 297 (*e*).

feindliche Vermögen [1] his debt due to an English creditor. The Tribunal determines the amount of compensation to which the claimant is entitled by ascertaining what he would have had but for the exceptional war measure of the German Government. Consequently, in such a case they award interest, for, if the Treuhänder had not collected the debt, the claimant would, as a creditor, be entitled to receive the amount of the debt and interest (*Claudius Ash, Sons & Co., Ltd.* v. *German Government*, Nos. 15–16–17, *Recueil des Décisions*, p. 198). But in a case in which dividends were paid to the Treuhänder they refused interest, for if the dividends had not been paid to the Treuhänder the case would have fallen within the terms of that part of par. 22 of the Annex to Section III, Part X, relating to compound interest (*Naylor Benzon* v. *German Government*, Nos. 15–16–17, *Recueil des Décisions*, p. 200).

In Claim No. 54, *A. D. & O. Dressel* v. *German Government* (unreported) the claimants were entitled to share in the estate of a relative who died intestate in Germany in 1918. The curator appointed, pursuant to the ordinary German civil law, to represent and safeguard the interests of absent heirs,[2] invested their shares in German war loan. A further sum due to the claimants out of the estate remained in the hands of the administrator. The claimants claimed these moneys under Article 297 at the pre-war rate of exchange. The Tribunal found that it was not established that the investments had been made by the direction or through the intervention of the German Court, and that no exceptional war measures, or measures of transfer, had been taken with regard to either of the sums which made up the claim. The Tribunal accordingly dismissed the claim.

In claim No. 85, *C. R. Hammer* v. *German Government* (unreported) the Tribunal held that the British holder of securities, the certificates for which remained in Germany, and which, through the fall in the mark, lost the greater part of their value in sterling, could not recover compensation unless he showed that he was really prevented by German war legislation from selling them. In such a case it is for the British claimant to show that he did something during the war to put into effect an intention to sell his stock, and that, but for the German exceptional war measures, a sale would have

[1] This office was established by a decree dated April 19, 1917. For an admirable compilation of the War and Treaty legislation affecting British property in Germany and Austria and enemy property in the United Kingdom see Mr. J. W. Scobell Armstrong's book, published by H. Hutchinson & Co.

[2] S. 1911 des Bürgerlichen Gesetzbuches.

taken place. In Claim 219, *Samuel* v. *German Government* (unreported) a claimant was awarded as compensation the diminution in the sterling value of certain shares in the Deutsche bank, but he had attempted to sell them in Switzerland in 1916, and was unable to do so solely because the coupons for dividends payable from 1915 onwards were not, owing to the outbreak of war, sent to him from Germany, and so became subject to the decrees of September 30, 1914, forbidding the export of securities to enemy countries, and of October 7, 1915, forbidding any act of disposal with regard to securities belonging to an enemy. In Claim No. 84, *Brummer* v. *German Government* (unreported), it was decided that the action of the German Military authorities at Ruhleben, who forbade anyone repatriated from the camp to take away more than 200 marks, constituted an exceptional war measure. The claimant recovered the proceeds of the sale of his furniture and of certain insurance policies at the pre-war rate of exchange.

For some time there was considerable doubt as to the meaning of the provisions with regard to the cash assets of enemies in Article 297 (*h*), and in par. 11 of the Annex to Section IV, Part X. It had been suggested that these provisions conferred upon all owners of cash assets in Germany, which did not constitute debts under Article 296, or which were not the proceeds of liquidation under Article 297, the right to have them credited through the Clearing Offices at the pre-war rate of exchange. The point was recently decided in Claim 158, *Executors of Mary Saunders* v. *German Government* (unreported). Cash assets to be dealt with as is provided by Article 297 (*h*) are only such as have come into the hands of a Government official as the result of an exceptional war measure.

Compensation to the owner of the goods requisitioned in Germany is awarded under the provisions of Article 297 (*e*). In most of the claims which come before the Tribunal the value of the goods at the date of their seizure has been assessed by the Reichswirtschaftsgericht, and payment made to the Treuhänder. The difference between this sum and that which the Tribunal regards as the value is awarded to the claimant as compensation. The Tribunal has decided that measures which are of a general nature, applying to the property of all persons in Germany, and which are not directed solely against the property of enemy nationals, may none the less be " exceptional war measures " within the meaning of the Treaty (*McLeod Russell & Co.* v. *German Government* (Nos. 9–10, *Recueil des Décisions*, p. 547), and Claim No. 196, *S. Sternberg* v. *German*

Government—unreported). A point raised in the latter case, *i.e.* as to whether taking over into a common administration the production and distribution of a particular article is an exceptional war measure, has not yet been decided.

In the *Owners of the "Seaham Harbour"* v. *German Government* (Nos. 9–10, *Recueil des Décisions*, p. 500) the Tribunal had to consider the question of its jurisdiction to entertain a claim, which the German Government contended fell within Part VIII of the Treaty relating to reparations. The claim was for the loss of profits, wages paid to the crew and other expenses occasioned by the detention of s.s. *Seaham Harbour* by the German authorities during the war. The ship finished unloading at the port of Hamburg on August 5, 1914, and was prevented from leaving. The crew were interned, and the ship remained unused in the Port of Hamburg until the autumn of 1915, when she was taken by the German naval authorities and used as a collier. No proceedings in Prize were ever taken. Article 242 of Part VIII provides that the provisions of that Part (*i.e.* the part relating to reparations) do not apply to the property, rights and interests, referred to in Sections III and IV of Part X of the Treaty. The Tribunal decided that the claim fell within their jurisdiction under Article 297, for the seizure was made in enemy territory, as it existed on August 1, 1914; it was an act directed against enemy property as such; it caused damage to the claimant's property, rights and interests; further, it removed from the owner the power of disposition over it (par. 3 of the Annex to Section IV, Part X).

In *Weiss Biheller and Brooks, Ltd.* v. *German Government* (No. 12, *Recueil des Décisions*, p. 850) the Tribunal again considered their jurisdiction, having regard to the provisions of Part VIII of the Treaty. The claimants had a banking account, on the outbreak of the war, at the Crédit Anversois, Société Anonyme, at Antwerp, and during 1917 a compulsory administrator appointed by the German Government compelled the bank to close the account, and pay the balance into the administrator's account, at another Belgian bank. The Tribunal decided that it was without jurisdiction to entertain the claim, for Article 297 (*e*), under which the claim was brought, dealt with property, rights and interests in German territory, as it existed on August 1, 1914, and did not extend to occupied territory. For the same reason the Tribunal dismissed certain claims relating to goods seized at Lodz, in Prussian Poland. There are many claims awaiting the Tribunal's decision, in which

goods were seized in occupied territory and removed to Germany, where further acts were done in respect of them by the German Government.

There are many cases before the Tribunal in which claims have been made in respect of entire businesses which have been liquidated in Germany, pursuant to German war legislation. The first measure usually taken with regard to enemy businesses in Germany was the appointment of a supervisor pursuant to the decree of September 4, 1914. The supervisor's duty was, whilst conserving the business, to make sure that it was not conducted in a manner conflicting with German interests. The next step was, in many cases, pursuant to the decrees of November 26, 1914, and December 22, 1914, compulsory administration. Following the compulsory administration the business became subject to the decree of July 31, 1916, and was liquidated.

The Tribunal, in these cases, has appointed neutral experts who are to report upon the value of the businesses affected before and after each of the exceptional war measures taken (Claim 270, *Personal Representatives of T. W. Twyford* v. *German Government* —unreported).

Under Article 296 or under Article 297 fall the majority of the matters which come before the Tribunal. The Treaty expressly confers jurisdiction on the Tribunal in the following further matters :

(1) *Article* 299 (*b*).—Each of the Allied and Associated Powers, within six months of the coming into force of the Treaty, was permitted, as an exception to the general provision that all contracts were to be regarded as dissolved from the time any two of the parties became enemies, to keep alive any contract to which one of its nationals was a party, and of which the execution was required in the general interest.

The Mixed Arbitral Tribunal is empowered to grant equitable compensation to a party to the contract, who, owing to altered trade conditions, is caused substantial prejudice by the execution of the contract.

The Anglo-German Mixed Arbitral Tribunal has not yet decided any point under this provision, but the question will shortly come before them.

(2) *Article* 300 (*b*).—The Tribunal may hear the claims of British nationals where measures of execution to their prejudice have been taken in German territory on account of failure to perform any act or comply with any formality during the war. The Tribunal may

deal with the matter, but only if it does not fall within the jurisdiction of the British Courts. Article 300 (*c*) provides that the Tribunal may order the restoration of the rights which have been prejudiced, and if such restoration is inequitable or impossible it may award compensation. In Claim No. 8, *Fine Arts Publishing Co., Ltd.* v. *Berliner Verlag G.m.b.H.* (unreported), the Tribunal declined to grant compensation in a case in which the claimants were offered restoration but declined to accept it.

(3) *Article* 300 (*d*).—The Tribunal may also, if the matter does not fall within the jurisdiction of the British Courts, grant relief in cases in which a contract between enemies has been dissolved by reason either of failure on the part of either party to carry out its provisions, or of the exercise of a right stipulated in the contract itself. Compensation may be awarded, but only if the restoration of the rights of the party prejudiced is inequitable or impossible (Claim No. 8, *Fine Arts Publishing Co., Ltd.* v. *Berliner Verlag G.m.b.H.*

(4) *Article* 302.—In a case in which judgment has been given during the war in a German Court against a British national, who has not been able to make his defence, and who has suffered prejudice by the judgment, he is entitled to recover compensation to be fixed by the Tribunal. The Treaty directs that compensation may be effected by replacing the parties in the position in which they were before the judgment was given.

The Tribunal has, in may cases, been called upon to exercise its jurisdiction under this Article. The Tribunal declined to interfere in Claim No. 24 (*Happold* v. *German Government*—unreported) in which it found that in the proceedings of which the claimant complained, and which were on appeal, he was legally represented. He had, in fact, not suffered prejudice and in consequence was not entitled to be compensated. In Claim No. 126, *Elders and Fyffes, Ltd.* v. *Hamburg Columbian Bananen A.G.* (unreported) the Tribunal set aside an order of attachment ("Pfändungs- und Ueberweisungs-beschluss") under which the balance standing to the credit of the German company, in which the claimants were interested, was paid over to the respondents in part satisfaction of a judgment the respondents obtained in the German Courts, of which the claimants were in ignorance. In case 216, *Kohn & Goldschmidt* v. *Joseph Schwabacher* (Nos. 15–16–17, *Recueil des Décisions*, p. 211) in the course of the proceedings for the liquidation of the estate of a German debtor who had died insolvent, the Court (Amtsgericht)

at Würzburg issued against Messrs. Kohn & Goldschmidt a judgment called in German law " Ausschlussurteil," the effect of which was to exclude them from being paid their debt along with the other creditors out of the assets left by the deceased. The Tribunal set aside the " Ausschlussurteil."

(5) *Article* 302.—The Tribunal may, similarly, compensate a British national who has suffered prejudice by judicial measures taken in an invaded or occupied territory, if he has not been otherwise compensated. No such claim has been decided by the Anglo-German Tribunal.

(6) *Article* 304 (*b*).—Sub-par. 2. In the arrangement of the Treaty " questions . . . . relating to contracts " occupy a place of honour, being expressly mentioned in the Article which declares in general terms the other questions which the Mixed Arbitral Tribunals shall decide.[1] The Tribunal has to decide all questions whatsoever their nature relating to contracts concluded before January 10, 1920, between British and German nationals, excepting questions within the jurisdiction of the British Courts. A British national, even in cases in which the matter is within the jurisdiction of the British Courts, may bring his case before the Tribunal, if this is not prohibited by British law. In Claim 151 *Israel and Oppenheimer* v. *Bleyer* (unreported) which was brought under Article 304, the claimants recovered damages for breach of contract. The respondents had failed to deliver a number of lace collars of two special designs which, on various dates between July and December, 1913, they had agreed to supply. In Claim 61, *Cassio, Ltd.* v. *Julius Fischer* (unreported) the claimants claimed to be entitled to the delivery of three special machines, part of an order of six machines. Payment was to be by instalments, and all the instalments, with the exception of a small sum, had been paid. The claimants contended that property in the machines had passed and that at the outbreak of the war the respondents held them as bailees. The Tribunal was of opinion that the question whether the property in the machines had passed was governed by German law. The general rule of German law is that property can be passed only by means of a physical delivery.[2] There is an exception only in those cases in which there is no doubt as to the real, conscious and common intention of the parties. This occurs only when the possession of the former owner is continued by virtue of another and new contract,

[1] See *supra*, p. 18.

[2] S. 929 des Bürgerlichen Gesetzbuches.

such as a contract of hire or bailment. The Tribunal found, in this case, that the property in the goods had not passed.

In Claim No. 99, *Block* v. *Gothaer Feuerversicherungsgesellschaft* (unreported), the Tribunal decided that under an insurance policy, made in Germany, and expressed in marks, the Insurance Company were liable to indemnify the claimant only in marks. The Tribunal was of opinion that it could not direct the Treaty rate of exchange to apply.

In Claim No. 131, *Norddeutsche Bank* v. *Board of Trade and the Public Trustee* (unreported), referred to above (p. 18) the Tribunal dismissed a claim under Article 340 (*b*) for the balance of money due to the Norddeutsche Bank under an agreement entered into during the war, by the licence of the Home Secretary under the Trading with the Enemy Proclamation No. 2 between the Norddeutsche Bank and the Nobel Dynamite Company, Limited. The Board of Trade, in the exercise of its powers, had vested in the Public Trustee the moneys due under the agreement. The Tribunal was of opinion that Article 304 (*b*) was not applicable because :

(1) The dispute was not between a British national and a German national.

(2) It did not relate to a contract, *qua* contract.

(3) It related to the exercise by the British Government of rights reserved to it by Article 207 (*b*).

Even if the case related to a contract, *qua* contract, the Tribunal expressed the opinion that as the contract was made by virtue of a licence given in accordance with the British emergency legislation, by the British Government, the question at issue would be within the jurisdiction of the British Courts.

(7) *Article* 305.—The Tribunal has never exercised its jurisdiction under this article, which gives to a party prejudiced by the decision of a competent Court, in a case covered by Sections III, IV, V or VII, the right of coming to the Tribunal for redress.

(8) *Article* 308.—Disputes as to certain questions relating to payments, indemnities, or royalties in respect of rights of industrial, literary, or artistic property appear to fall within the jurisdiction of the Tribunal. No decision has yet been given by the Tribunal under the provisions of this article.

(9) *Article* 310.—The Tribunal has not been called upon under this article to fix the conditions of new licences in respect of industrial, literary and artistic property.

This concludes a short survey of the work of the Anglo-German

Mixed Arbitral Tribunal. Limits of space render it impossible to make any mention of the procedure before the Tribunal.[1] The writer has not, for the same reason, dealt exhaustively with the Tribunal's decisions, but has attempted to select typical cases, and to refer to them in such a way as will indicate the character of the questions which come before the Tribunal, and the manner in which they have been solved.

[1] The Rules of Procedure are published as *Statutory Rules and Orders*, 1920. No. 2,062, and are obtainable from H.M.'s Stationery Office. Price 3*d*.

THE PARLIAMENTARY SYSTEM IN NORWAY.

[*Contributed by* H. B. Lees-Smith, Esq., M.P.]

(*The Author wishes to express his thanks to Mr. M. M. Mjelde of the Norwegian Foreign Office for the documents and information that have been provided, at considerable trouble, for the purpose of this article, and for his patient revision of the manuscript.*)

Observers and travellers in Norway have for more than a century been impressed by the democratic structure of the Norwegian Constitution. Its special characteristics arose out of the fact that they were created by a people who, though nominally under royal absolutism, were essentially democratic. For nearly four centuries before 1814 the kingdoms of Norway and Denmark were united under one King, but the union was mainly a personal one, and Norway had its own laws, its own institutions, its own army. During the Napoleonic Wars their King threw himself on the side of Bonaparte, and at the Treaty of Kiel paid the penalty for this miscalculation by being compelled to surrender the crown of Norway to the King of Sweden. He advised his Norwegian subjects to submit themselves to their new ruler, but they replied that he had no legal right to transfer his authority over Norway to an outsider without the assent of the nation itself. At the National Convention of Eidsvold—famous in Norwegian history—on May 17, 1814, the present Constitution was promulgated, and Prince Christian Frederick, up till then the King's representative in Norway, was elected to be the King of an independent Norway. After the lapse of some time, which Norway utilized for military preparations, a Swedish army crossed the frontier under Karl Johan Bernadotte to enforce the Treaty of Kiel. But before a fortnight had passed, or any serious action had been fought, the campaign was ended by negotiation. The exact reason for this has long been disputed, but the chief factors were that the Norwegian forces, on land and sea, showed greater power of resistance than Bernadotte had expected, and in the meantime his diplomatic position was uncertain. Norway's

opposition might have taken a long time to overcome; the Allies, especially England, were not sympathetic to her final destruction, and an immediate settlement was important to Bernadotte as the Congress of Vienna was on the eve of assembly. On the other hand, England's blockade of Norway caused serious alarm in the mind of King Christian Frederick. The result of the doubts in both the Swedish and Norwegian headquarters led to the compromise arranged at the Convention of Moss in August 1814. Norway accepted the Swedish King, but on condition that the Constitution of May 17 should remain unaltered, with the exception of such amendments as were needed to provide for union with Sweden. The Constitution drawn up at Eidsvold thus became the Magna Charta of Norway and has remained the basis of her Government to the present time.

The Rupture with Sweden.—The causes leading up to the separation of Norway and Sweden fall within recent memory. Political and temperamental differences between the two countries created a series of disputes that made the position of their joint King a difficult rôle to fill. The most serious conflicts eventually arose over the question of the control of foreign affairs. By Article 26 of the Norwegian Constitution the final authority in this sphere was left with the King.[1]

As there was no definite provision in the Norwegian Constitution as to how and by whom the King should in ordinary circumstances administer Norwegian foreign affairs, the King placed their conduct in the hands of the Swedish Foreign Minister. This arrangement led to objections from Norway, but it was tolerated as long as the Swedish Foreign Minister was the agent of the King. In 1885, however, by a change in the Swedish Constitution, the personal power of the King was curtailed, and the conduct of foreign affairs was vested in the hands of the Swedish Foreign Minister, who was made responsible to the Swedish Parliament. Norway thus found herself subjected in foreign policy to the Swedish Parliament, and events gradually developed to the final rupture. This was brought to a head by the question of the Consular Service.

[1] Before the King could declare war precautions were introduced to ensure full consideration of the important issues. A joint extraordinary meeting of the Norwegian and Swedish Ministers had to be held. In this meeting a report had to be read from the Norwegian Government as to the opinion and resources of Norway, and a similar report from the Swedish Government. Each Minister's individual opinion had then to be obtained and placed on record. Finally, the King had the right to decide the question in accordance with what he believed best in the interests of the two countries.

From the beginning of the union there had been a joint Consular Service for both countries. At the time of the rupture, the Norwegian mercantile fleet was three times as large as the Swedish. Sweden had adopted a high tariff system, while Norway was almost a free trade country, with the result that commercial treaties had to contain separate agreements for the two countries. In some instances they had entirely distinct treaties. The control of the consular service was in 1850 vested in the Foreign Minister, and his transformation into a purely Swedish official in 1885 led to the belief among the people of Norway that the interests of Norway were likely to be sacrificed where they clashed with those of Sweden. The Norwegian Parliament accordingly passed a resolution in 1891 demanding the establishment of a separate Norwegian consular service. The dispute that arose from this demand and the numerous attempts that were made to settle it by negotiation continued for fourteen years. It finally reached its climax when, all negotiations having failed, and the King having refused to sanction the Norwegian Bill, the Storthing, on June 7, 1905, passed the resolution " that the Union with Sweden under one King is dissolved in consequence of the King having ceased to act as a Norwegian King." In August of the same year Prince Charles of Denmark was elected King of an independent Norway by a popular vote, which was at a later stage formally confirmed by the Storthing.

This climax had less effect than might have been expected upon the Constitution. The union with Sweden in 1814 had left the main structure of the Constitution promulgated at Eidsvold untouched, but had merely introduced the few enactments necessary to create the union. The abandonment of the union, therefore, directly affected the latter amendments only, and the original Constitution of May 17, 1814, with slight alterations necessitated by modern developments, still remains the foundation of government.

The Storthing.—The Norwegian Parliament—the " Storthing " —is elected by adult suffrage, the vote being given to both men and women of over twenty-three years of age.[1] Proportional representation for all the constituencies was introduced in 1919, and for this purpose the country is divided up into constituencies of from three to eight members.[2] The " list " system of proportional representation has been adopted in preference to the

[1] Article 50 of the Constitution.
[2] Article 58 of the Constitution.

method of the single transferable vote usually advocated in this country.[1]

The Storthing contains 150 members. The Constitution has always divided the members between the rural districts and the towns in the proportion of two to one,[2] a proportion which is at present fair to both, as the urban population of Norway has now risen to as much as one-third of the total. The constituencies are separately named in the Constitution, and the difficulty of obtaining the large constituency that proportional representation requires out of the smaller towns is met by grouping all the towns in a county or in two or three neighbouring counties into single constituencies.[3]

The Storthing is elected for three years, and the Constitution does not provide any means of dissolving it within a shorter period.[4] Proposals to adopt the British practice on this subject have been discussed, but the Storthing has hitherto refused to accept them on the grounds that the period between elections is so short as to make a change unnecessary and that the Government's right to dissolve the Storthing might be misused by the Crown. At present there is a movement on foot to appeal to introduce the referendum into the Constitution. By-elections are rare in Norway, as, in addition to the actual members, deputy-members are elected who take the place of those who fall ill, die, or are permitted by the Storthing to retire temporarily. A person cannot be elected a member of the Storthing except for the constituency in which he resides, but an exception is made in the case of those who have been Ministers, who can be elected for any constituency.[5]

The Royal Veto.—The Constitution has contained from its inception a provision, bold at the time, for giving the King nothing more than a suspensory veto over legislation. The King might refuse to sanction a Bill, but if it was passed unaltered by three Storthings after three successive elections it became law without the assent of the Crown.[6]

This provision led to a number of fierce conflicts between the Storthing and the Crown. King Karl Johan (Bernadotte) twice demanded that the King should be granted an absolute veto, but on both occasions the Storthing refused any change in the Constitution. The Bill for the abolition of the nobility in Norway, intro-

[1] Circular No. 1 on the Election of the Storthing, 1921, issued by the Department of Justice, gives full particulars of the system.

[2] Article 57 of the Constitution.

[3] Article 58 of the Constitution.

[4] Article 71 of the Constitution.

[5] Articles 61 and 63 of the Constitution.

[6] Article 79 of the Constitution.

duced in 1821, after having nearly precipitated a *coup d'état* on the part of the King, was about to be passed by means of this provision when the King gave in and accorded his sanction. In three other instances, the Law of 1842 on Liberty to hold Religious Meetings, the Law of 1882 on the Sale of Farms used by Government Servants, and the Law of 1884 on the Appointment of Police Officers in Rural Districts, the Storthing had to repeat its decision before the King assented to the Bill. On the other hand, there are some instances of the Storthing dropping a Bill which had once been refused royal sanction.[1]

The suspensory veto has not been used since the establishment of a parliamentary Ministry in 1884, except in the case of the Flag Law, and it is unlikely that such an issue will be raised again.[2]

Ministers and the Storthing.—The relationship between the Storthing and the Ministry is technically somewhat peculiar. Ministers are appointed by the King. They may attend the Storthing and take part in its debates, but they may not be active members of it.[3] If a member of the Storthing becomes a Minister he thereby vacates his seat, and his place is taken during his tenure of office by the deputy member. A Minister holding office can, at the general elections, be elected a member of the Storthing, but he cannot take his seat until he retires from office,[4] the deputy member occupying his seat in the meantime. But in spite of these

[1] T. H. Aschehoug's *Norges nuvaerende Statsforfatning*, second edition, vol. ii, p. 165.

[2] The only instance of a Bill becoming law without the King's sanction is the Flag Law of 1898. The Constitution prescribed that Norway should have its own mercantile flag, while the naval flag should be a Union flag. In 1821 the Storthing decided the form and colours of the mercantile flag, still in use. But the King, on the grounds that the Barbarians would not acknowledge it, forbade its use south of Cape Finisterre, and ordered the Swedish flag to be used by Norwegian merchant ships farther south, while the Norwegian Navy should use the Swedish flag everywhere. After much discontent in Norway over these royal orders, a new flag resolution was given in 1845. In the Norwegian mercantile flag of 1821 was put a "union sign" composed of Norwegian and Swedish colours, while the Norwegian naval flag was also given the colours of 1821 with the "union sign." The Swedish mercantile and naval flags were given the same "union sign" as the Norwegian flags. There was dissatisfaction both in Norway and Sweden with this alteration of the national mercantile flags. But while the Swedish discontent gradually subsided, that of Norway grew, until at last the Storthing passed a Flag Bill prescribing the reintroduction of the mercantile "clean flag" of 1821. The King refused his sanction on the ground that, as Sweden now would not abolish the "union sign," the Swedish mercantile ships would be alone in representing the union by the flag. The Flag Bill was passed by three Storthings after new elections, and in 1898 the bill became law without the King's sanction.

[3] Article 74 of the Constitution.

[4] Article 62.

provisions the position of Ministers is in practice similar to that which they occupy in this country. They are now ordinarily chosen among the leading members of the Storthing from the parties that have the majority, and they hold office, as in Great Britain, as long as they retain the confidence of the Storthing. Ordinary citizens outside the Storthing can be appointed Ministers without conforming to the British convention and becoming Members of Parliament. The clumsy provision by which Ministers vacate their seats as members of the Storthing in favour of their deputy members is now an anomaly dating from the days before the complete establishment of parliamentary government.

Until the last quarter of the nineteenth century Ministers were appointed by the King without any parliamentary co-operation and were regarded as his agents, although the Storthing never hesitated to use its prerogative of having Ministers prosecuted and sentenced for giving the King bad advice. The Bill passed by the Storthing to enable them to take part in its debates was immediately recognized by the King as a democratic innovation aimed at his authority and his sanction was refused. Three consecutive general elections upheld the standpoint of the Storthing that the Ministers should take part in its debates and thus become parliamentary Ministers, and, finally, the whole Ministry which had supported the King were impeached and sentenced to forfeiture of their positions. The Bill was eventually sanctioned and the first parliamentary Ministry, formed by Johan Sverdrup, the great Liberal leader in Norway, was appointed in 1884. Since that time full parliamentary government has prevailed, whether the Ministries have been Liberal, Radical or Conservative.

The Committee System.—The Storthing works by means of a standing committee system of the French type. There are sixteen regular committees, and additional committees are appointed for special subjects. Every member of the Storthing is a member of some committee. The committees consider all Bills to be laid before the Storthing, whether Government or private Bills, and advise the Storthing how to vote. Committees usually ask the Minister concerned with the subject under consideration to participate in its discussions and give information. The committee system leads to a very minute examination of government proposals and to strict supervision of each Minister. It is complained that, as the Storthing usually approves what the committee approves, questions are settled outside the public arena, and the position of the Ministers as

responsible leaders is weakened. There are frequent assertions that on questions concerning railways, the post, telegraph and telephone services, canals and roads, pressure is exerted by the committees on behalf of sectional interests. These criticisms are the same as those heard in France and other countries with a similar procedure, but there is no proposal to abandon the system.

The Second Chamber.—The original draft of the Constitution of 1814 proposed the creation of a Second Chamber of a privileged type and of great strength.[1] The Constituent Assembly, however, rejected this proposal, and instituted the present system. Its special interest is due to the fact that for over a century it has been based upon the principle—now being widely followed—of the election of a Second Chamber by the Members of Parliament themselves. When a new Storthing has been chosen it elects from among its own members one-fourth to constitute the Second Chamber, the "Lagthing." The remaining three-fourths constitute the First Chamber, the "Odelsthing." This election is the first task of a new Storthing to be carried through immediately after the election of its President and Vice-President. The next task is for the two "Things" each to elect their own President and Vice-President, and it is not until this has been done that the Storthing is duly constituted, and the Speech from the Throne delivered.[2] The Norwegian Parliament thus contains three assemblies—the Lagthing, the Odelsthing, and the Storthing *in plenum*—each with its own President and Vice-President. When the Lagthing and the Odelsthing are deliberating separately, the Odelsthing meets in the Storthing

[1] It provided that the Second Chamber should be elected by and among the Members of Parliament in such a way that the representatives coming from each province (*stift*) should elect a certain number from among themselves as members of the Second Chamber (*Lagmandsting*). No member was to be elected to the Second Chamber unless he possessed landed estate of a certain value or a certain annual income. The president of the Second Chamber was to be appointed by the King. The members of the Second Chamber were to sit for six years, while the period of life of the rest of the Parliament was to be only two years. Every second year one-third of the Second Chamber was to retire. Practically every matter dealt with by Parliament was to be carried through both Chambers, and the opposition of either could prevent its passage.

[2] "The Storthing shall elect from among its members one-fourth part, which constitutes the Lagthing; the remaining three-fourths form the Odelsthing. The election shall take place at the first ordinary Storthing that meets after a new election, and thereafter the Lagthing shall remain unchanged during all such Storthings as meet after the same election, except in so far as any vacancy which may occur among its members has to be filled by special election.

"Each Thing shall hold its meetings separately, and elect its own president and secretary. Neither of the Things shall hold meetings unless two-thirds of its members are present."—Article 73 of the Constitution.

Chamber, while the Lagthing has a room of its own. Although a double discussion is thus provided for, the cases in which the Storthing acts as a separate assembly are severely circumscribed. The principal functions of the Storthing can be summarized as follows:

1. Ordinary Legislation.
2. Financial Legislation and Control.
3. Control of the Executive by means of the elaborate machinery that will be described later.
4. Naturalization of Aliens.
5. Alterations of the Constitution.[1]

The only case in which the Storthing acts in two chambers is the first. The subordinate part played by the double chamber device is illustrated by the provisions for alterations in the Constitution. Bills for this purpose were held by the framers of the Constitution to need special precautions against hasty decisions. But these precautions were secured not by means of a second chamber but by ensuring special care from the Storthing acting as a single chamber. Such Bills must be brought before the opening session of a newly elected Storthing and cannot be carried until its period of office has expired, a general election has been held, and a new Storthing has been elected. The Bill can then only be passed if it secures the assent of two-thirds of the members.[2]

The secondary part played by the Lagthing will now be evident. Even in the case of the Bills that come before it, its powers are strictly limited. It cannot initiate any legislation. All Bills must be introduced into the Odelsthing. From there they go to the Lagthing, which may either approve or reject them. Its rejection of a Bill usually takes the form of amendments, although there are some instances of total rejection. A Bill which thus fails to pass the Lagthing goes back to the Odelsthing. If the Odelsthing accepts all the Lagthing's amendments or acquiesces in its rejection of a Bill, the difference between the two chambers of course comes to an end. If, however, it refuses to do so the Bill goes back to the Lagthing, which now discusses it for the second and last time. If they still refuse to pass the Bill it goes finally to the Storthing *in plenum*, where—without any debate—it is put to the vote and a two-thirds majority is needed for its passage. Three days must elapse between each discussion.[3]

[1] Article 75 of the Constitution. [2] Article 112 of the Constitution.

[3] "Every law shall first be proposed in the Odelsthing, either by its own members, or by the Government through a Cabinet Minister.

"If the proposal is there accepted, it is sent to the Lagthing, which either approves

One would have expected the Constitution to define with care the distinction between the legislation requiring the single and the double chamber system, in the same way that the British Constitution lays down the means of distinguishing ordinary Bills from money Bills.[1]

No such expressed distinction is to be found, but parliamentary tradition of the last hundred years has decided the question, so that disputes are very infrequent.

In the case of finance the practice has been established that the annual budget is voted by the Storthing as a single chamber while the permanent rules and regulations for taxation are passed through the two assemblies separately. The general tendency of the practice that has been built up is to restrict the two-chamber system to the strictest limits that the Constitution permits.

The Results of the Norwegian System.—The practical working of these provisions can now be summarized.

1. Disagreements between the two Chambers are rapidly settled. The authority of the Lagthing rests not upon any power of delay, for this can only occupy a few days, but upon the need of a two-thirds majority for a Bill that is in dispute.

2. Disagreements on issues of political principle do not occur. Since the Lagthing is elected by the Storthing, it reflects its opinion and by an understanding similar to that on which committees are constituted in the House of Commons, parties are represented in the Lagthing in rough proportion to their strength in the Storthing as a whole. The Lagthing is not intended to enter into political disputes with the Odelsthing; and as the dominant party or parties have a majority in both chambers, such conflicts do not arise. Disagreements take place and the decision of the Storthing *in plenum* is frequently invoked, but they are on committee points of practical rather than political importance, and do not arouse party feeling.

The members selected for the Lagthing are on the whole of the same type as those who do most of the committee work in the House of Commons—practical men with experience in agriculture,

or rejects it, and in the latter case sends it back with comments appended. These are taken into consideration by the Odelsthing, which either drops the Bill or again sends it to the Lagthing, with or without alteration.

"When a Bill from the Odelsthing has twice been laid before the Lagthing and has been a second time rejected and returned by it, the whole Storthing shall meet and dispose of the Bill by a majority of two-thirds.

"There must be an interval of at least three days between each of these deliberations."—Article 76 of the Constitution.

[1] Parliament Act, 1911, section 1.

industry or local government—while those with more political initiative are retained in the Odelsthing.

The Control of Executive Policy—Domestic and Foreign.—The control of the Storthing over executive policy, particularly in foreign affairs, was greater than in any other European country before the war. For this control Norway reverts to the single-chamber system, but in this case the single chamber is the Odelsthing and not the Storthing as a whole.

The Constitution enacts that the minutes of the Cabinet and all public reports and documents must be laid before the Storthing and that alliances and treaties into which the King has entered must also be communicated to it. For this purpose the Odelsthing is the acting assembly and appoints a special committee—the Committee of the Protocol—which discusses with scrupulous care the cabinet minutes and the other documents submitted to it. For the control of foreign affairs a remarkable system has been developed. Matters which the Council of State wishes to keep private or secret articles of treaties are laid before a committee of nine members chosen by the Odelsthing from among themselves.

These members are acquainted with every diplomatic step that the Government takes and no secret can be constitutionally kept from them.

If anything appears to be wrong in the eyes of a single member he has the right to bring it before the Odelsthing itself.[1] The debate in the Odelsthing usually takes place behind closed doors, and the standing orders of the Storthing lay it down that members of the Odelsthing are bound to preserve secrecy with regard to the discussion unless the Odelsthing by resolution decide otherwise.[2]

The Lagthing as a Court.—The Lagthing has certain judicial functions of the same kind as are exercised by a number of other

[1] "To the Storthing shall belong the following powers and duties:

"1. To have laid before it the minutes of the Cabinet and all public reports and documents; the minutes of diplomatic matters and of matters concerning military and naval command shall, however, if they have been decided to be kept secret, be laid before a committee consisting of at most nine members elected among the members of the Odelsthing, and may also be put before the Odelsthing, if a member of the said committee proposes that the Odelsthing shall express its opinion or that prosecution before the Riksret (constitutional High Court) shall be instituted.

"2. To have communicated to them the alliances and treaties that the King on behalf of the State has entered into with foreign Powers; in respect of secret articles, which, however, must not be in antagonism to the public articles, the same rules apply as prescribed under letter f for matters that have been decided to be kept secret."—Article 75 of the Constitution.

[2] See also the British Command Paper, 6102 (1912).

second chambers. Its members, in conjunction with the High Court of Justice, constitute the Riksret (the constitutional Court of the realm) which tries cases of impeachment brought against members of the Council of State, of the High Court of Justice, and of the Storthing for crimes committed in the exercise of their official duties. The Odelsthing is the body which puts forward the accusation.[1] In the early days of the Constitution, when Ministers were suspected of being too servile towards the King, they were frequently impeached and sentenced to fines. Down to 1845 there were six such cases. Then there was an interval of thirty-eight years when no instance occurred. But in 1883 there was a wholesale impeachment against eleven ministers who had advised the King not to accept the Storthing's proposal to admit Ministers to participate in their debates. The sentence included fines and forfeiture for ever of their positions as Ministers.

Since the establishment of parliamentary Ministries in 1884 there has been no instance of any Riksret case against Ministers, as there are now simpler means of getting rid of them.

Does Norway possess a Second Chamber?—It is significant that the Norwegian Constitution does not use the term "chamber," but the word "section" to indicate a division of much less importance.[2] The best summary of her reply to the second chamber problem is that she possesses a one-chamber system with the rudiments of a two-chamber system. This is the broad conclusion reached by the chief Norwegian Professors of Law. Professor Bredo Morgenstierne sums up the position as follows: "The most prominent feature of our National Assembly, in contrast to most others, consists in the fact that the Storthing is chiefly, though—as will be shown—not plainly, organized as one Chamber."[3] "It is a modification, not of a two-chamber system, but of a one-chamber system."[4] "At most it can be spoken of as a one-chamber system with some few traces of the two-chamber system."[5] He also points out that the Storthing assembles and is dissolved as one Chamber and that the division in two sections is not an external but an internal act.[6] His predecessor, Professor T. H. Aschehoug, in his classic work

[1] Article 86 of the Constitution.

[2] "The people exercise the legislative authority through the Storthing, which consists of two sections, a Lagthing and an Odelsthing."—Article 49 of the Constitution.

[3] Bredo Morgenstierne, *Laerebog i den norske Statsforfatningsret*, second edition, pp. 166, 168, 169. [4] *Ibid.* [5] *Ibid.*

[6] Bredo Morgenstierne, *Laerebog i den norske Statsforfatningsret*, second edition, pp. 166, 168, 169.

on the Constitution of Norway, expresses a similar opinion: "From the hands of the electors the Storthing issues as a single Chamber. The fact that it is divided by itself in the Odelsthing and the Lagthing cannot create any great antagonism. Generally the fundamental political opinion entertained by the majority of the Storthing will have the mastery in each of its sections. Moreover, the importance of this division is decreased in two ways. In the first place, many important matters are dealt with by the whole Storthing alone. It is only law Bills which are dealt with separately in the Odelsthing and the Lagthing. In the second place, even such matters must be laid before the whole Storthing in cases where the sections do not agree."[1]

The present system has been tested for 108 years, sometimes under very difficult political circumstances, to the entire satisfaction of the nation. It has been an important factor in preserving national unity by preventing the Storthing from being directed into two opposing sections. The fact that the Storthing as a single Chamber always presented a united national front as against a Union King, who in critical situations was governed by Swedish opinion and interests, saved Norwegian independence. Now that the difficulties created by the Union have ceased and the royal power has been strictly defined no party shows any desire to have a second Chamber of the type usual in other countries. On the contrary, the Norwegian people appear to be proud of the system which, if not first created, was first developed, in Norway by long constitutional practice and now is being imitated by other nations.[2]

[1] T. H. Aschehoug, *Norges nuværende Statsforfatning*, second edition, vol. i, p. 319.

[2] T. H. Aschehoug, *Norges nuværende Statsforfatning*, vol. i, p. 319, says that the Norwegian system has its origin in the Constitution of the Batavian Republic of 1798.

NATURALIZATION AND CITIZENSHIP OF MARRIED WOMEN IN THE UNITED STATES.

[*Contributed by* R. NEWTON CRANE, ESQ., K.C.]

THE United States Congress by the passage, on September 22nd last, of an act entitled, "An Act Relative to the Naturalization and Citizenship of Married Women," has added to its statutes on this subject a law which not only repeals former American statutes but is subversive of the existing rules which govern the actions of States in their intercourse with one another.

Perhaps one of the most remarkable incidents in connexion with this new law is that its enactment was not only not opposed, but that there was no hostility to it in debate in either the House of Representatives or in the Senate, and that it had the immediate approval of the President. Furthermore, it does not appear to have been commented upon by the public press in the United States or in the foreign countries whose citizens are directly affected by it.

The absence of opposition to the enactment of the law may be explained by the fact that both of the political parties in the United States had pledged themselves, by their "platforms" in the presidential campaign of 1920, to a change in the existing laws with respect to the citizenship of married women. The Republican "platform," adopted at the National Convention in Chicago, on June 8, 1920, contained the following announcement:

> There is urgent need of improvement in our Naturalization Law. No alien should become a citizen until he has become genuinely American, and adequate tests for determining the alien's fitness for American citizenship should be provided for by law.
>
> We advocate, in addition, the independent naturalization of married women. An American woman, resident in the United States, should not lose her citizenship by marriage to an alien.

The Democrats, in their Convention, on June 28, 1920, at San Francisco, advocated :

Federal legislation which shall ensure that American women residents in the United States, but married to aliens, shall retain their American citizenship and that the same process of naturalization shall be required for women as for men."

It was therefore impossible for any member of Congress of these two political parties to oppose the Act which, it was contended, was a compliance with the party pledges.

On account of its brevity, and especially of its importance to the nationals of other countries, the law may be set out in full :

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.

Sec. 2. That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization ; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions :

(*a*) No declaration of intention shall be required ;

(*b*) In lieu of the five-year period of residence within the United States and the one-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.

Sec. 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship before a Court having jurisdiction over naturalization of aliens : *Provided*, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of section 2 of the Act entitled " An Act in reference to the expatriation of citizens and their protection abroad,"

approved March 2, 1907. Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999 or of section 2 of the Expatriation Act of 1907 with reference to expatriation.

SEC. 4. That a woman who, before the passage of this Act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by section 2 of this Act: *Provided*, That no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this Act.

SEC. 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

SEC. 6. That section 1994 of the Revised Statutes and section 4 of the Expatriation Act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907.

SEC. 7. That section 3 of the Expatriation Act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this Act, have for all purposes the same citizenship status as immediately preceding her marriage.

Approved, September 22, 1922.

In order to understand the reference in the law to the naturalization of women whose political status is affected by it, it may be explained that naturalization in the United States consists of two distinct steps. The applicant must first formally declare, in a court of record having a seal, his intention to become an American citizen. This he may do immediately upon his arrival in the country. Five years after making this declaration, he may apply to a Court of similar jurisdiction for a certificate of naturalization. The granting of his application depends upon the discretion of the Court after hearing evidence of his residence for five years continuously in the United States and his fitness for citizenship.

The carriage of the Act was in the hands of representatives from two Western States, Colorado and California. Mr. Vaile, of Colorado, in introducing it, stated that its object was to overcome the inadequacy and injustice of the present laws with respect to the citizenship of women, a recognition of which had been forced upon the country by the world war and the passage of the nineteenth

amendment to the Constitution of the United States granting suffrage to women.

The war, according to Mr. Vaile, illustrated the injustice to the United States and the hardship to women of the rule by which the marriage of an American woman to an alien automatically severed her citizenship of and her allegiance to the country of her nativity, and made her a citizen of the country of her husband, whatever might be her wishes with respect to such change of allegiance. These women, being aliens by reason of their marriage, were to a large extent beyond the control of the laws of America, and could not be punished for treason or charged with the duties or responsibility of American citizenship. Numerous instances were cited of American-born women who, having never lost their love for the country of their birth, found themselves after their marriage legally alien enemies and, as such, liable to the sequestration of their property in America and, if resident abroad, subject to the legal duress and restrictions and to the social suspicion and ostracism which attached to them in the country of which their husbands were natives.

Mr. Vaile mentioned, in particular, the case of the daughter of an admiral in the American Navy who was wealthy in property acquired entirely by her family residing in the United States. In the war she had one brother in the American Army and one brother who had enlisted in the French Army before America entered the war. While she was a mere school-girl in Switzerland she had married a German who proved to be of no worth and no character. He frittered away all her property, of which he could get possession, and gave her abundant cause for divorce. For this reason she was obliged to take up a separate abode in Switzerland, where she instituted divorce proceedings against her husband. Because he was an officer in the German Army, these proceedings were stayed for the entire period of the war. During the war she went to Hungary, and there busied herself in relief work for the wounded prisoners of the allied armies. The American Alien Property Custodian, in the execution of his duty, seized and held the remainder of her property, consisting of a trust fund in the United States. Reduced from wealth and luxury to absolute poverty, this woman, who had never ceased to be an American at heart, returned to America penniless to appeal to the chivalry of the American Congress to restore her citizenship. Fortunately her appeal was vigorously supported by the Alien Property Custodian, and Congress granted it.

This and other illustrations of "hard cases" of like character, were supplemented by Mr. Vaile and others with the argument that to admit women of foreign birth to American citizenship, and, therefore, to the right to vote, simply by reason of their having married an American, and who were devoid of any personal loyalty to the country, were ignorant of its history and its institutions, and who were incapable of intelligently voting upon any matters relating to the country, was a great injustice to American women. With respect to the effect of the proposed law on the citizenship of children of a marriage between American citizens and alien women and American women and foreign subjects, it was explained that these children would take the citizenship of the land of their birth, according to existing law. This apparently satisfied all possible objection to the measure, and it was passed with practical unanimity.

It will be of great interest to observe the operation of the law in practice. An illustration of its complexity has arisen in England through the marriage, since the passage of the law, of an American official, temporarily stationed in England, to an English woman. He has applied for leave of absence from his post, but as his wife, notwithstanding her marriage, retains by this law the citizenship of her country of origin, he cannot obtain an American passport to enable her to return to America with him. As, by the law of England, she became an American citizen by her marriage to an American husband, she cannot obtain an English passport. She must, therefore, remain in this country during her husband's absence, however extended it may be. Likewise, if he is transferred to a post in another country, she will be unable to obtain either a British or an American passport to enable her to accompany him. It is not apparent in what manner she may at any time hereafter be introduced into the United States in order to enable her to obtain American naturalization. The provision in the new law for the shortening of the period of residence in the country from five years to one year for applicants who are the wives of American husbands, evidently relates only to American women who, after their marriage to aliens, remain in the United States.

THOUGHTS ON THE CONSTITUTION OF THE IRISH FREE STATE.

[*Contributed by* PROFESSOR J. G. SWIFT MACNEILL, K.C.]

THE establishment of the Constitution of the Irish Free State is, since the construction of the Constitution of the United States, the most momentous achievement in the history of the governing institutions based on the great prototype of the British Constitution.

The first article of the Irish Constitution declares that the Irish Free State is a co-equal member of the community of nations forming the British Commonwealth of Nations. The entrance of Ireland into that Commonwealth of nations confirms and strengthens —it even elevates—the rank, the status, the nationhood of every member of that community. Ireland, it must be remembered, unlike the other members of the British Commonwealth of Nations, was never a dependency of Great Britain. Ireland was always a nation. Ireland had a Parliament as old as the Parliament of England. That Parliament existed not as a favour, a concession, or a grant, but as the inherent right of freedom. From the admitted principle that the Crown of Ireland was appendant and inseparably annexed to the Crown of England came the claim of the English Parliament to legislate for Ireland. Over all the other colonies and dependencies of the British Crown the British Parliament had exercised the right of legislation. Over Ireland that Parliament asserted the same right, which was fiercely and successfully contested and was finally abandoned in 1782, when the Irish House of Commons, in an Address to the Lord Lieutenant, claimed in reference to the struggle then concluded that the sole and exclusive right of legislation, external as well as internal, had been firmly asserted on the part of Ireland and unequivocally acknowledged on the part of Great Britain. The Irish Constitution of 1782 admitted the equality in dignity of the two kingdoms of Great Britain and Ireland and the independence of their respective Legislatures. The equality of the two kingdoms of Great Britain and Ireland was acknowledged by

the Union which created one United Kingdom. The establishment of the Irish Free State preserves to Ireland her position and indefeasible status as an independent nation and her entrance into the British Commonwealth of Nations as an equal member of that Commonwealth confirms and strengthens the status of each member of that Commonwealth as an independent nation—" in the fulness," to use the words of Mr. Healy, the Governor-General, " of partnership in liberty with the nations co-operating in equal membership of a great Commonwealth of free peoples."

A perusal, however cursory, of the Constitution of the Irish Free State will show that the framers of that Constitution took as their model, like the framers of the American Constitution, the British Constitution of their own times and endeavoured to improve on that model. The British Constitution of 1789, on which Jefferson and his associates worked in the framing of the American Constitution was, however, essentially different from the British Constitution of 1922, on which the framers of the Irish Constitution worked.

Since the time of George III, by the process of constitutional development, then in its infancy, there has grown up by the side of our written law an unwritten and conventional Constitution. As distinct from the positive law of the British Constitution, there are conventions of the Constitution and constitutional morality consisting of maxims and practices which, though they regulate the ordinary conduct of the Crown and its Ministers, and every detail, in short, of the practical working of Government, are not laws in the true sense of the word, for if any or all of them were broken no Court would take notice of their violation, although their breach would almost immediately bring the offender into conflict with the law of the land. Professor Dicey, having given some instances of the rules which belong to the conventions as distinct from the laws of the Constitution, hazarded the conjecture, writing thirty years ago, that under a new or written Constitution some of them would take the form of actual laws. The framers of the Constitution of the Irish Free State have fulfilled Professor Dicey's anticipation by the conversion of many of the principal conventions of the British Constitution into the positive law of the Irish Free State, while in many instances they, like the framers of the American Constitution, have improved on the British Constitution as they found it.

The Constitution of the Irish Free State incorporates so many of the conventions of the British Constitution and variations of these conventions, indicative in themselves of the trend of opinion

in the direction of reform of governing institutions, as to present a subject for fruitful contemplation to the student of constitutional development and of the ethics of comparative jurisprudence.

I take a few illustrations of the conversion of the conventions of the British Constitution into the positive law of the Irish Free State Constitution in which that instrument abounds. It might indeed be utilized as a valuable work of political maxims universally acknowledged and carried out in the practice of the British Constitution but not found among the formal Acts of the British Legislature nor forming part of the law of Great Britain.

The convention of the British Constitution whereby Parliament meets at least once a year is due to the need of the appropriation of supply, and of the Army Act, which makes it legally necessary for Parliament to sit once a year. That convention becomes positive law in the Irish Free State Constitution, while the date of the reassembly of each House of the Irish Legislature and the date of the conclusion of the session—matters which, in the words of the Speaker of the House of Commons on December 15, are for the Crown in the British Constitution, are in the Irish Free State Constitution largely placed in the discretion of the Dail Eireann or Chamber of Deputies. "The Oireachtas [Irish Legislature] shall hold," says the Constitution, "at least one session every year. The Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King, and subject as aforesaid Dail Eireann shall fix the date of the conclusion of each session of each House. Provided that the sessions of Seanad Eireann (the Senate) shall not be concluded without its own consent" (Art. 24). It is moreover provided that Dail Eireann may not at any time be dissolved except on the advice of the Executive Council (Art. 28). The conduct of the English House of Commons under the leadership of Sir John Eliot in the memorable scene on March 2, 1629, in keeping the Speaker in the Chair as a protest against the command of Charles I to him to direct the House to adjourn is vindicated by anticipation under the provisions of the Irish Constitution by which Dail Eireann is empowered not merely to control its own adjournments—an undoubted parliamentary privilege—but to control the prorogation and the time of the reassembling of the Irish Legislature.

Again, one of the fundamental principles of parliamentary government is in the British Constitution not a law but a mere convention, although it is embodied in the Standing Orders of the House

of Commons. That convention is incorporated in the following Article (37) of the Irish Constitution as positive law: "Money shall not be appropriated by vote, resolution, or law unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council." Three Standing Orders of the British House of Commons, made in the early years of the eighteenth century, which for upwards of a hundred years were the only Standing Orders ordained for the self-government of that assembly, have established the practice which has been faithfully maintained that any motion which creates a charge upon the public revenue must receive the recommendation of the Crown. By this practice the great constitutional principle has been established and maintained that the Sovereign, having the executive power, is charged with the management of all the revenue of the State and with all payments of the public services. Thus, the Crown demands money, the Commons grant it, and the Lords (subject to the provisions of the Parliament Act, 1911) assent to the grant; but the Commons do not vote money unless it is required by the Crown, nor do they impose or augment taxes unless it is declared by the Crown through its constitutional advisers that such taxation is necessary. That great principle, whose non-observance would render parliamentary government on the basis of the party system wholly impossible owing to the pressure from without to which unofficial members would be subjected to obtain financial assistance for local needs and enterprises has, however, no recognition in English law, written or unwritten. The salutary practice did not prevail even in practice in the old Irish Parliament, although it has become part and parcel of the new Irish Constitution. Thus the grant of £50,000 to Mr. Grattan in gratitude for his services in the establishment of Irish parliamentary independence in 1782, which was unanimously voted, was moved not by a Minister of the Crown but by an unofficial member.

The conventions of the British Constitution converted into positive law and embodied in some cases with amendments significant of the trend of public opinion become of especial interest in relation to the position of the President of the Council (Prime Minister) and the Executive (Cabinet) Council as defined under the provisions of the Irish Constitution.

"The rights and duties (under the British Constitution) of the Prime Minister," wrote Mr. Gladstone in 1878, "as head of the

Administration are nowhere recorded. He is almost if not altogether unknown to the common law." "It is said," wrote Sir William Anson, thirty years later than Mr. Gladstone, "and said truly, that the Prime Minister is unknown to the law; no salary is attached to the office, if office it can be called; the term does not occur in any Act of Parliament nor in the records of either House. In two formal documents only does he find place. Lord Beaconsfield described himself in the Treaty of Berlin as Prime Minister of England, and on December 2, 1905, the King (Edward VII) by sign manual warrant gave to the Prime Minister place and precedence next after the Archbishop of York." "The Cabinet," wrote Mr. Gladstone, "lives and acts simply by understanding without a single line of written law or constitution to determine its relations to the monarch or the relations of its members to one another or to their head." "The student," wrote Sir William Anson, "will discover that the legal relations of King and Ministers or of Ministers and Parliament convey little idea of the practice. It is true that the King appoints the Ministers, but he does so on the advice of the Prime Minister. It is true that he also appoints the Prime Minister, but the Prime Minister is practically chosen for him by the opinion of the party which a general election has placed in a majority in the House of Commons." "There is," writes Mr. Gladstone, "no statute or legal usage of this country which requires that the Ministers of the Crown should hold seats in the one or the other House of Parliament. It is perhaps upon this account that whilst most of my countrymen would, as I suppose, declare it to be a becoming and convenient custom, yet comparatively few are aware how near the seat of life the observance lies, how closely it is connected with the equipoise and unity of the social forces. It is rarely departed from, even in an individual case, never, as far as my knowledge goes, on a wider scale. . . . I desire to fix attention on the identification in this country of the Minister with the member of a House of Parliament. It is as to the House of Commons especially an inseparable and vital part of our system." "There is," writes Sir William Anson, "no statutory (or legal) necessity that any one of the Ministers should be in Parliament, but in practice a Minister who could not obtain a seat in the House of Commons and who was not and did not wish to be a member of the House of Lords could not continue to hold office for many weeks." The complete acceptance moreover of the theory that the action of the Cabinet is the action of each member and that for the

action of each member the Cabinet is responsible as a whole is a tendency characteristic of the constitutional practice of the last fifty years, a constitutional convention whose observance is of the essence of parliamentary government. Although wholly unrecognized by law, those conventions have been converted into positive law with additions thereto of qualifications as indicative of the trend of public opinion in the Irish Free State Constitution. That Constitution thus enunciates the legal status of the Cabinet: "There shall be a Council to aid and advise in the Government of the Irish Free State, to be styled the Executive Council. The Executive shall be responsible to Dail Eireann [an enactment of ministerial responsibility to Dail Eireann, and through it to the electorate], and shall consist of not more than seven nor less than five Ministers [a limit to the number of Cabinet Ministers, which is in Great Britain discretionary, varying from seven in the time of Pitt to twenty-two in the time of Lloyd George] appointed by the Representative of the Crown on the nomination of the President of the Council" (Art. 51). "Those Ministers who form the Executive shall all be members of the Dail Eireann [an application of the cardinal maxim of the British conventional Constitution that the House of Commons is the centre of political power] and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance [a provision in accordance with British constitutional practice by which a seat in the Cabinet is attached to the holding of certain offices]" (Art. 52). "The President of the Council shall be appointed [by the Crown] on the nomination of Dail Eireann" (Art. 53). The constitutional practice in respect to the appointment of a Prime Minister in the English Constitution is here bereft of formalities, reduced to reality. "The House of Commons is an electoral chamber," wrote Mr. Bagehot in 1865. "It is the assembly which chooses our President." The choice of a British Prime Minister which Bagehot assigns to the House of Commons, in the opinion of Mr. Low, writing nearly fifty years later, has passed to the constituencies, whose members go to the House of Commons pledged to vote for a certain outstanding party leader.

The assent of Dail Eireann to the appointment of the other Ministers who are to hold office as members of the Executive Council on the nomination of the President (Art. 53) gives an absolute selective power to Dail Eireann, which is very limited

in the case of the House of Commons, and such as is only exercisable in certain cases in which the constituencies are not particularly interested. "In one respect," writes Sir William Anson, "the House of Commons retains a certain selective function. A man must show in debate that he has some powers of speech, some dexterity in the handling of a subject, some readiness in reply in order to constitute himself a candidate for office. A Prime Minister, in filling the subordinate offices of government, will probably choose men who have shown themselves acceptable to the House. There are cases in which neither the men nor the office occupy to an appreciable extent the attention of the electorate, and to this extent the House of Commons does exercise a real though not a dominating influence on the choice of candidates." Dail Eireann has a "dominating influence" on the choice of candidates for subordinate offices in the Executive Council.

The provision of the Irish Constitution that the President and the other Ministers nominated by him shall retire from office should they cease to retain the support of a majority in Dail Eireann (Art. 53) is an enunciation of the great constitutional principle embodied in the famous motion made by Sir Robert Peel in 1841 against the Ministry of Lord Melbourne and carried by a majority of one, affirming that the Ministers of the Crown did not possess the confidence of the House of Commons and that their continuance in office under such circumstances was at variance with the spirit of the Constitution.

The provision, however, which is the most momentous departure from the practice of the British conventional Constitution and makes the relation of Dail Eireann to the Executive Council to the very fullest extent the relation of master to servant, is embodied in the proviso (Art. 53) that "the Oireachtas [Legislature] shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dail Eireann." The prerogative of dissolution is one which in Great Britain the King exercises on the advice, and at the request, of his Ministers, and a request for dissolution is not refused. Indeed, in the spring of 1922 an attempt was made to establish a doctrine for which there is not a shadow of precedent that it was the prerogative of the Prime Minister, independently of the consent or even of the knowledge of his colleagues in the Cabinet, to tender advice to the Crown in reference to the dissolution of Parliament. On the defeat of a Ministry in the House of Commons it is unquestionably

in accordance with British constitutional practice that the defeated Ministry may appeal to the electors to decide between them and the House of Commons. On the carrying of the motion of want of confidence in Lord Melbourne's Government, to which allusion has been made, a dissolution of Parliament immediately followed and a general election in which the country declared itself adverse to the Ministers. So, too, there was an appeal to the country on the defeat of the Home Rule Bill in the House of Commons in 1886. The power of Ministers, when defeated in the House of Commons, to appeal to the country, of which the Irish Cabinet is expressly deprived, immensely increases the power of a Ministry over the House of Commons which has appointed that Ministry and whose servant it is. Mr. Bagehot thus tersely expounds this position: "The Cabinet which was chosen by one House of Commons has an appeal to the next House of Commons. Either the Cabinet legislates and acts or else it can dissolve. It is a creature, but it has the power of destroying its creators. It is an Executive which can annihilate the Legislature as well as an Executive which is the nominee of the Legislature. It was made, but it can unmake. It was derivative in its origin, but it is destructive in its action." The influence exercisable over the House of Commons by the power of a Cabinet which has ceased to retain the support of a majority to advise a dissolution is the measure of the value of the power vested in Dail Eireann by the denial, under the Irish Constitution, of that power to the Executive Council. An observer so acute as Sir William Anson writes: "The weapon by which the Prime Minister or the Cabinet enforces its will upon the Commons is the threat of a dissolution. The mere intimation that if the necessary support is not given to a Government its careless or lukewarm supporters may be sent to explain their conduct to their constituents has been known to produce the desired result." Again he writes: "If a Minister is certain that Parliament will be dissolved as a matter of course, on his request, there is no reason why he should not announce his intention to call for a dissolution, and use his announcement to influence waverers in an approaching party division or followers who are slack in attendance and support. In fact, the power of dissolution is a formidable disciplinary weapon in the hands of a Prime Minister."

The convention of collective cabinet responsibility, which is of the essence of parliamentary government, becomes, under the Irish Constitution, positive law by the following provision: "The Executive

Council shall be collectively responsible for all matters concerning the Departments of State administered by members of the Executive Council" (Art. 54). The framers of the Irish Constitution, realizing that Ministers under that Constitution are actually chosen by Dail Eireann, and that such Ministers are the servants and not the opponents of Dail Eireann of which they must be members, have wisely provided that the appointment of a member of Dail Eireann to be a Minister shall not entail on him any obligation to resign his seat or to submit himself for re-election (Art. 58). This article is of intense importance as an object-lesson of the attainment of the ideal of cabinet government—an Executive which is part and parcel of the Legislature in sympathy and in spirit and not estranged therefrom. The separation of the Executive and the Legislature, which is the essential feature of the American Constitution, is due to the experience of the framers of that Constitution of the Ministers of the time of George III, who were servants of the Crown which had interests separate from the people and to the jealousy of the presence of such servants in the House of Commons—a jealousy which found its expression in an article of the Act of Settlement, excluding all placemen or pensioners from the House of Commons —an article modified before the Act of Settlement came into operation by the Place Act which renders vacant the seats of members of the House of Commons who accept places or pensions under the Crown, in some cases permitting them to seek re-election, and in others absolutely disqualifying them from membership of the House of Commons. So recently as 1919 the necessity incumbent on members of the British House of Commons accepting office under the Crown to submit themselves for re-election was partially removed by a Statute which provides that acceptance of office under the Crown by a member of the House of Commons within nine months from the date of the commencement of the Parliament then in existence does not affect his parliamentary status. The framers of the Irish Constitution have improved in this respect on the law of the British Constitution, and have further provided that Ministers should be members of Dail Eireann, whereas under the British Constitution members of the House of Peers are freely eligible for appointments as Ministers of the Crown. This exclusion of Ministers from the Irish Senate is in consonance with the trend of the development of Cabinet Government towards the bringing of Ministers into close and intimate association with the House of Parliament, whose servants they are more specially.

The design of the framers of the Irish Constitution that Dail Eireann should be master of the Executive is clearly manifested. Their aim that Dail Eireann itself should be the express image and the servant of the people of Ireland from whom, as in the words of the Constitution, " all powers of government and all authority, legislative, executive, and judicial, are derived" (Art. 2) is no less evident. The Irish Legislature, unlike the British Parliament, and unlike the old Irish Parliament, is not a sovereign body. There are distinct limitations to its powers. Thus, for instance, a governing clause provides that if conflict between the Constitution and the Treaty between Great Britain and Ireland of December 6, 1921, which the Irish Constitution Act has been passed to implement, should arise, the Treaty must prevail. The opinions of the Law Officers of the Crown, both of the late and the present British Government, are emphatic that a contingency of that character is unlikely to occur. It is, moreover, provided that the judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution (Art. 65), and it is also provided—an improvement on the British Constitution, ardently advocated by Lord Brougham and shown by recent incidents to be expedient—that a judge shall not be eligible to sit in the Legislature and shall not hold any other office or position of emolument (Art. 69). But above all the establishment of the system of referendum, for whose operation the utmost facility is afforded both in ordinary legislation and in changes affecting the Constitution itself—in poignant contrast with the difficulty in the amending of the American Constitution—and a provision for popular initiative in legislation, make the electorate, not the Legislature, practically omnipotent, within the limits of the Constitution, in legislation.

Modern experience has pronounced almost decisively in favour of a bi-cameral as against a uni-cameral Legislature. By the Irish Constitution a bi-cameral Legislature is established, but the Senate or Upper House, which is itself an elected body under a system of extraordinary ingenuity for the securing of the due representation of every interest in the community, is not even in theory a body of equal power with Dail Eireann. The functions of the Senate are in the main advisory and consultative. It is entitled to be informed, to advise, to warn. It can retard, by the application, under special and well-defined conditions, of the referendum legislation with a view to the taking of the judg-

ment of the people thereon. It has no absolute veto on proposed legislation.

The constitution and powers of the Senate of the Irish Free State are worthy of careful study in relation to proposals for the reform of the House of Lords. In this article, necessarily confined within a small compass, many matters have been left untouched, notably the questions of Ireland's Dominion status, of the powers of the Governor-General, and of the right of appeal under certain conditions from the judgments of the Irish Courts. Those subjects will, I am confident, raise no difficulties in the development of the Irish Constitution under conditions of good-will between Ireland and Great Britain.

The Constitution of the Irish Free State cannot fail to impress the student of its provisions as a monument of brilliant constructive statesmanship and of profound political genius. Charles James Fox, the intimate political friend of Grattan, speaking in the British House of Commons in March 1797, in moving a motion in relation to Ireland, suggested by Grattan himself, described the Irish Constitution—Grattan's Constitution—notwithstanding its theoretical excellences, as "a mirror in which the abuses of the English Constitution are strongly reflected."[1] The new Irish Constitution, in poignant contrast with its predecessor, contains provisions and capacities for development calculated to excite the envy and the admiration of lovers of the British Constitution, even if they be so enthusiastic and devoted as to think it, in the quaint language of George III, "the most perfect of human formations."

[1] *Irish Debates*, xvii, p. 218. Mr. Fox's speech is reported in full in that volume of the Irish Debates.

THE MEDIÆVAL LAW AND PRACTICE IN REGARD TO ACCOUNTS.

[*Contributed by* DAVID MURRAY, ESQ., LL.D., F.S.A.]

QUESTIONS of accounting were as frequent in the Middle Ages and in the succeeding centuries as they are now, and much of the time of the courts of law was devoted to cases relating to accounts. While the jurists do not expound the principles of book-keeping, a considerable amount of information regarding business books and accounts may be gleaned from their pages, much of which is conveniently summarized by Benvenuto Straccha, an eminent mercantile lawyer of Ancona in the early part of the sixteenth century, in his tract, *De Mercatura*.[1] Amongst the more prominent authorities whom he cites are Bartolus of Saxoferrato (1313–59), Baldus de Ubaldis (1327–1400), Jason de Mayno (1435–1519), and Andrea Alciati (1492–1550).

It was the custom of merchants to keep books and it was a duty incident to their vocation. *Scartafacium* or *Chartafacium* was a memorandum book or pocket-book *per viam memoriæ et recordii*—particularly one kept during the great fairs—in which the merchant jotted down all his transactions as they arose.[2]

[1] Pars secunda, no. 51 *sqq*. *De Mercatura et Mercatore Tractatus* (Venet. 1553; Lugd. 1556, 1558, 1558 and 1581; Venet. 1573; Col. 1576, 1585; Amst. 1665, all in 8vo); and in *De Mercatura Decisiones et Tractatus varii* (Lugd. 1592, 1621, fol.; Amst. 1669, fol.).

As to the commercial law of Ancona, see Reddie, *Historical View of Maritime Commerce*, pp. 285 *sqq*. (Edinburgh, 1841, 8vo).

[2] *Decisiones Rotæ Genuæ de Mercatura*, Dec. 1, nos. 6, 8, 17, 19, 32, 33, 42; Dec. 91, no. 2. The *Decisiones*, the judgments of the supreme civil tribunal of Genoa, were regarded as of the greatest authority by courts and text writers in the sixteenth, seventeenth and eighteenth centuries. They were edited by Marco Antonio Belloni and were printed at Genoa in 1581 and published at Venice in 1582, fol.; again *Ib*. 1606, 8vo. They were reprinted in a collection of works by Straccha and others, *De Mercatura Decisiones et Tractatus varii* (Lugd. 1592, fol., *Ib*. 1621, fol., and Amst. 1669, fol.). See the last, pp. 3, 5, 9, 11, 206.

The references to pages in these notes are to the edition of 1669.

There is a list of references to printed mediæval accounts in Kheil, *Cotrugli Raugeo*, p. 14 (Wien, 1906, 4to).

Manuale, Adversaria,[1] or *Memoriale,*[2] the waste-book or day-book, was the common counting-house book of all traders, in which receipts and payments, sales, purchases and other transactions were entered roughly and without order, *memoriæ gratia. Codex, Liber magisteralis,* or *Quadernettum,*[3] Ital. *Libro maestro* or *Quaderno,* the ledger, was the principal book.

The *Adversaria* and the *Liber Magisterialis* are the only two books recognized by Baldus,[4] and it may be that the Journal (Ital. *Giornale*) had not then been devised, or at any rate that it was not in general use. It was, however, well known by the end of the fifteenth century, and is the key to book-keeping by double entry. It is, says Alciati of Milan (1492–1550), a protocol, the material from which the ledger is prepared.[5] All entries (*partitæ*)[6] were carefully prepared and were posted to it (*in libro magisteriali ponuntur*) from the journal, or the day-book where there was no journal, and were clearly and distinctly entered.

In book-keeping by double-entry, *partita* is technically a "journal-post"—that is, an entry drawn up in the journal, ready for being transferred or transported, as the old writers say, to the ledger.

Cash Dr. to Wheat.
To 100 quarters of wheat at 40*s.* per quarter £200 0 0

is a journal-post. "Cash Dr. to wheat" is called the "entry," the particulars which follow are called the "narration." *Ponere in libro magisteriali* is to transfer or transport the "entry" part of the post to the proper account in the ledger, the entry so made in

[1] *Decisiones Rotæ Genuæ,* Dec. 2 *in init.,* and no. 27, pp. 14, 17; Straccha, *De Mercatura,* Pars. ii, no. 52.

[2] Baldus uses *memoriale* for a business book generally (*Consilia,* vol. iii, Cons. 449, no. 10 B), but he had in view apparently the day-book, waste-book or mere memorandum book.

[3] *Decisiones Rotæ Genuæ de Mercatura,* Dec. 26 *in init.* and nos. 23, 25, pp. 111, 114; Dec. 173, p. 288; Straccha, *De Mercatura,* pars ii, no. 51.

[4] Philipp Decius, *Super Decretalibus,* f. 261, no. 19 (Lugduni, 1548, fol.).

[5] Alciati, *Responsiones,* lib. vi, Cons. 64, nos. 4, 5, 6 (Basil, 1582, fol.). Alciati was a pupil of Jason de Mayno.

[6] *Partita* means an entry in a business book; preserved in the French *partie,* and Italian *partita.* It is also used of an account of sales (*partitæ venditionum*), an account rendered, a state for settlement; also a sum or parcel of money, *partitæ librarum,* so many pounds sterling.

Capitulum is also used of an entry. See Baldus, *in Cod.,* 2. 1. 1; *Opera,* v, p. 85b, no. 11; *in Cod.,* 7. 59; *Opera,* viii, p. 86, no. 6; *in Cod.,* 7. 62. 39; *Opera,* viii, p. 102, nos. 3, 4; Philipp Decius, *Super Decretalibus,* f. 260, nos. 17, 20, 21, Lugduni 1548, fol.; Mathesilanus, *Singularia,* 78, in the *Singularia Doctorum,* p. 200, Francof. 1596, fol.; Brunneman, *De jure principis circa Rationes civitatum,* iv, § 35, p. 80; French *chapitre* is similarly used.

the ledger being termed *positio.*[1] The terms "post" and "posting" in daily use have thus an antiquity of at least five hundred years. A debit entry was *partita dati*, and a credit entry *partita accepti*, corresponding to the Italian *dare* and *havere* and French *doit* and *avoir*; and the familiar *per contra* appears in the term *partita per contra*.

The ledger ought to have a preface or title, thus: "Hic est liber Bartholomæi Thomasii," as pointed out by Bartolus and Baldus.[2] An inscription to this effect: "Hic est liber G. & B. fratrum" showed that the trade was carried on in name of a firm and was sufficient to establish the fact of partnership.[3] It was likewise the practice for the book-keeper who wrote up a book to insert his name and designation (*stylus*) at the commencement, which was long continued.

Partnership books were *libri sociales. Libri cujusdam negotii artis lanæ*, the books of a woollen factory, and so of other businesses.

Subsidiary books in use were *Factura*, Ital. *Fattura*, a sales book or invoice book[4]; *Chartularium*, a banker's ledger or account book,[5] *Diurnale*, a banker's journal,[6] but both terms were applicable to similar books of other traders; *Registrum litterarum*, a letter book,[7] in which letters were copied (*exemplatæ*). Letters themselves were accurately distinguished as *Litteræ missivæ*,[8] letters despatched, and *Litteræ responsivæ*, letters received in reply.

At the beginning of the ledger there were also placed the date and year of the Pope or of the Emperor. The book was to be regularly and carefully written so that accounts could be taken from it, and the debit and credit entries properly made and a balance struck. Bartolus, commenting on *Cod.*, II. 5. 2,[9] refers to

[1] *Decisiones Rotæ Genuæ*, Dec. 16, nos. 1, 3.

[2] Both upon *Cod.* 3. 38. 4, no. 6; Bartoli, *Opera*, vii, p. 142[b] (Lugd. 1555, fol.); Baldi, *Opera*, v, p. 243 (Venet. 1615, fol.).

[3] Straccha quotes in support of this the *Consilia* of Philipp Decius (1453-1535) and of Bartholomæus Socinus of Siena (*d.* 1507). See also Maranta, *Speculum aureum*, Pars vi, De Testium productione, No. 78.

[4] *Decisiones Rotæ Genuæ de Mercatura*, Dec. 31, No. 7, p. 128.

[5] *Ib.*, Dec. 38 *in init.*, p. 147. "De credito autem constat per extractum partitarum Chartularii dicti banci facta collatione cum diurnalibus."

[6] *Decisiones Rotæ Genuæ de Mercatura*, Dec. 26 *in init.* and nos. 23, 25, pp. 111, 114; Dec. 173, p. 288; Straccha, *De Mercatura*, pars. ii, no. 51.

[7] *Decisiones Rotæ Genuæ*, Dec. 1, no. 43, p. 11. *Cf.* Casaregis, *Opera*, pp. 96 *sqq.* (Venetiis, 1740, fol.).

[8] In Scots practice missive letters, or simply missives, means a contract constituted by letter, or other informal writing.

[9] Bartolus, *Commentarii in tres libros Codicis*, p. 34[b] (Lugd. 1555, fol.); Baldus, *In iiii et v Codicis libros Commentaria*, p. 57[b], no. 60 (Venet. 1615, fol.).

the manner in which officials receiving and paying away large sums of money ought to keep their accounts. As regards receipts they should insert in their cash-book, the date, the amount received, the person from whom it is received and for what it is paid, and similarly in the case of the payments they make. Tutors and other administrators ought to state fully in their accounts the purposes (*causæ*) for which payments are made so that they may be conveniently examined.[1] Moderate and *ex facie* reasonable disbursements were passed without production of vouchers.[2] An account which is not intelligible is not an account at all. Accounts ought not to be kept on loose sheets,[3] but in regular books in accordance with the custom of merchants and local usage. The books must be free from erasures, interlineations, and corrections. The ledger might be written either by the merchant or by another on his behalf. Whatever is written in a business book in the merchant's possession and under his own control must be presumed to be written by himself unless the contrary be proved.[4]

Partnership accounts should be made up once a year, gone over, examined and checked.[5] The senior partner was entitled to the custody of the business books.[6] The conclusions of an ordinary action of accounting was to produce a good, true and legal account with payment of the balance.[7]

The rule for balancing accounts between partners or joint adventurers, either with or without time, is, says Stypmann, known by arithmeticians as *Regula consortii*, that is our rule Fellowship, otherwise Distributive Proportion.[8]

[1] Baldus, *supra*, p. 57[b], no. 62 ; Beroius, *Consilia*, i. 192, no. 18, 2.

[2] Baldus, *in Cod.*, 2. 1. 1 ; *Opera*, v, p. 85[b], no. 11 ; *in Cod.*, 7. 59 ; *Ib.*, viii, p. 86, no. 6.

[3] Baldus, *Consilia*, Cons. iii, 152, no. 1. He distinguishes between *fogliacia*, loose sheets, and a *Codex Rationum*, a book of accounts.

Loose sheets are the *papiers* or *feuillets volants* or *brouillars* of the French jurists. See Pothier, *Traité des Obligations*, Part iv, c. 1, Arts. 4, 6, ss. 758, 760, following Dumoulin, *ad. L. 4 Codicis de Rebus Creditis. Naismith* v. *Bower*, July 1, 1665. *M.* 12621.

The American Card Ledger System and the Loose Leaf Ledger of to-day have somewhat upset their ideas ; but a principle underlies the use of these loose leaves. Odd scraps written anyhow, which is what is meant in the text, won't do.

[4] See *Decisiones Rotæ Genuæ*, *supra*, Dec. 173, p. 288; Decius, *Super Decretalibus*, f. 261, no. 24 (Lugduni, 1548, fol.).

[5] See Baldus, *Consilia*, Lib. iii, Cons. 152, Francof. ad Moen. 1589, fol. ; Maranta, *Speculum Aureum*, Pars iv, Judiciorum Distinctio, no. 28 *sqq.*

[6] Jason de Mayno, *Consilia*, ii, Cons. 192, no. 5.

[7] See, for example, *Decisiones Rotæ Genuæ*, Dec. 24, p. 108 ; Dec. 59, p. 167.

[8] *Tractatus de Jure maritimo et nautico*, Pars iv, c. 11, No. 23 (Gryphiswaldiæ, 1652, 4to).

All the older jurists, following the glossators and founding upon various texts of the civil law,[1] mention four points to be observed by all whose duty it was to render accounts: (*a*) To produce account books regularly kept; (*b*) to make an accurate calculation; (*c*) to show the balance; (*d*) to purge delay by paying what was due.[2] It was not enough to exhibit the account; the books containing the entries (*partitæ*) along with a certificate of accountants (*calculatorum depositio*) were to be produced along with them.[3]

The posts or entries in the Journal must be dated, or otherwise they are of no value. An account rendered must bear the year, month and day, and in Roman practice the consulate.[4]

A business book is to be read as a whole. If a claimant founds upon one entry, other entries which tell for the respondent must be read along with it. In this it differed from a letter. If the writer of a letter acknowledged in it a certain indebtedness and referred to the repayment of the various sums, it was held that the letter was proof of the debt but not of the payments.[5] If one received a balance-sheet and kept it without a disclaimer (*reclamatio*), he was presumed to be satisfied with it, but upon the footing that it was a true balance and corresponded with the books.[6]

Litera rationis is a statement of receipts and disbursements; *Rationem constare* is to balance an account; *Reliquatum* is the net balance on hand after deducting charges and expenses; *Computa venditionis* is an account sales. Profit (*lucrum*) on a transaction is that which remains after all expenses have been deducted.[7] Much judicial time has been spent in recent years in determining what are profits of a company, with the same result as is to be found in the *Consilia* of Bartholomæus and Marianus Socinus four hundred years ago, that what a company has beyond its stock or capital (*capitale salvum*) is profit (*lucrum*).[8]

[1] *Dig.*, 35. 1. 82; *Ib.*, 40, 5, 37 and 47, § 2.

[2] See, for example, Baldus, *Ad librum vii Cod.* l. 4, *Opera*, viii, p. 3[b]. (Venet. 1615, fol.); Jason de Mayno, *Consilia*, iii, Cons. 4, no. 7; iii, Cons. 14, no. 15 (Francof. 1611, fol.); Mevius, *Consilia*, Cons. 16, no. 192 (Francof. 1717, fol.).

[3] Jason de Mayno, *Consilia*, iv, Cons. 100, no. 9, *supra*.

[4] Baldus, *Consilia*, lib. iii, Cons. 152.

[5] Baldus, *in Cod.*, 2. 2. 1, no. 11, *Opera*, vol. v, p. 85[b], and *in Cod.*, 7, 59, *Opera*, vol. viii, p. 86, no. 6; Mathesilianus, *Singularia*, 78. *Singularia Doctorum*, i, p. 201 (Francofurti, 1596, fol.).

[6] Casaregis, *Opera*, i, pp. 340, 341.

[7] *Decisiones Rotæ Genuæ de Mercatura*, Dec. 58, no. 10, p. 180; following *Dig.* 17. 2. 30.

[8] Socini, *Consilia*, 24, col. 12.

Partnership was often more of the nature of Joint Adventure than the relationship we now know as partnership; but whether it was partnership strictly so called, or Joint Adventure, or partook of the nature of a Joint Stock Company, the object for which it existed was the making of profits (*communis lucri causa*). Partnership of any kind therefore involved the keeping of accurate accounts, and of making an exact balance either periodically or at a stated period. This implies the keeping of an account of purchases and sales, of outgoings and receipts, *i.e.* of credits and debits, the ascertainment and valuation of stock and of outstanding accounts, so that in the end profit or loss—*lucrum sive damnum*—should be ascertained. The arrangements amongst partners or joint adventurers were often complicated, and the ascertainment of their shares of profit and loss often required intricate calculation.

All these requirements were met in commercial practice in the time of the Roman Empire, in the Middle Ages and in later times. Roman arithmetic was very laborious, and, for long after the introduction of Arabic figures, the ordinary processes of calculation were complicated; but all necessary calculations were made accurately. The methods of book-keeping were doubtless quite as complicated and clumsy, but accounts were made out and balance-sheets prepared and certified as they are to-day. Disputes as to the manner of stating accounts, as to capital and revenue expenditure, and as to balance-sheets, arose then as now, and were much the same in character.

Legal literature is full of such questions, and also as to loans to partnerships, the division of partnership property, and so on.

Small holdings are much before the public at present, and one of the questions discussed is whether there is a profit if wages at current rates are paid to the sons and daughters of the crofter who do the work of the croft. Such questions are not new. Baldus de Ubaldis in the fourteenth century puts the case of two brothers who have a small farm; one has two sons and the other has none. All four work on the land. How are the profits to be divided? After fully considering the question in all its aspects, he holds that the profits are to be divided *per capita* and not *per stirpes*.[1]

A statement of transactions was *computum negotiorum*; a

[1] Baldus, as quoted by Jason de Mayno, *De Actionibus*, f. 86[b], no. 47 (Lugduni, 1565, fol.).

He also refers to a *Consilium* of Bartolus.

statement of credits and debits was *calculus datorum et acceptorum.*[1] When a payment was made it was entered in the books both as a credit and a debit.[2] A balance-sheet was *bilantia, bilancium.*[3] An account beginning with a balance shows that there were prior transactions brought to a point by the calculation of the balance.[4] When one was under an obligation to account it was not enough to produce a balance-sheet alone, even when there was a difficulty in producing the books themselves, although it might be received for certain purposes.[5]

In the case of disputed accounts, which were remitted to an accountant (*calculator*, *revisor* or *peritus*), the books were put before him, the entries pointed out, and parties heard. It lay with him to determine whether further information was required, or whether it was sufficient to go over the books and check them. In making his report (*relatio*) it was not necessary that he should do so in presence of the parties, or that it should be upon oath[6]; and it was no objection to it that it was made upon a festival of the church (*dies feriata in honorem Dei*), seeing that the reports of professional persons, such as physicians, midwives, accountants, and other men of skill are not judicial acts.[7] The adjusted account made up by the referee was termed *calculus*, a word which was used in early Scots practice.

Then, as now, there were good merchants and bad merchants, but the mass of them was, in the opinion of Baldus—*in jure civili et pontificio singularis memoriæ summæque scientiæ vir*[8]—the *summum bonum* and quintessence of humanity.[9] He seems, however, to

[1] *Decisiones Rotæ Genuæ*, Dec. 18, nos. 8, 14, pp. 93, 94.

[2] *Ib.*, Dec. 1, no. 5, p. 2; Dec. 2, nos. 16, 25, pp. 16, 17; Dec. 18, no. 7, p. 93.

[3] Dec. 176, nos. 4, 17, pp. 295, 296. *Cf.* Casaregis, *Opera*, i, p. 339.

[4] *Decisiones Rotæ Genuæ*, 132, p. 247.

[5] Dec. 176, pp. 294 *sqq.*

[6] See *Decisiones Rotæ Genuæ*, Dec. 98, p. 217; Dec. 141, p. 254; Dec. 187, no. 2, p. 311; Straccha, *De Mercatura*, Pars ii, no. 67; Casaregis, *Opera*, i, pp. 339, 340; Mascardus, *De Probationibus*, Cond. 252.

[7] Jason de Mayno, *Consilia*, ii, Cons. 200. The accountant's report on this case was made on August 1, which is the Feast of St. Peter ad Vincula, but de Mayno explains that it is not a festival *in honorem Dei*, and the tradesmen's workshops and shops in Rome were open upon it.

[8] So says Straccha, *Tractatus de Decoctoribus*, no. 1.

[9] Baldus, *Consilia*, vol. i, 348, no. 4; Straccha, *De Mercatura*, Pars ii, no. 4, 64. Jean de Coras of Toulouse (1513–72), a notable Protestant lawyer, quotes this passage with approval, when dealing with the servitude *Officiendi luminibus*. Merchants, it is said, keep their warehouses dark and badly lighted that customers may not observe defects in their cloths. The merchants defended the practice on the ground that light injured their fabrics. Corasius, *Miscellaneorum Juris Civilis Libri VII*, iii, c. 24, no. 9, p. 310, Col. Agrip. 1590, 8vo.

have had his doubts, for elsewhere he asks the question, " Whither goeth the soul of a merchant ? " A merchant, he says, is in truth in peril of his salvation, for it is difficult in carrying on buying and selling to prevent sin (*peccatum*) creeping in. The psalmist himself says (Ps. lxx. 15 ; E.V. lxxi. 15) : *Quoniam non cognovi negotiatores introibo in potentias Domini*, " Because I have not known merchants I will enter into the powers of the Lord." [1] Let a merchant therefore have a care for his salvation.

A curious matter of controversy was whether if an account is copied on a sheet of paper (*fogliacium seu appapiru*) [2] by means of the abacus, credit is to be given to it, or whether that is to be reserved for formal books. The objection taken to its reception was that a document written by the abacus could be easily altered for a fraudulent purpose by the addition, by the removal or by the

[1] The Sixtine revision of the Vulgate reads *litteraturam* in place of *negotiatores* or rather *negotiationem*, for in using the former word Baldus seems to have been quoting from memory. The older Latin version reads *negotiationem* or *negotiationes*. Augustine, commenting on this passage, says : " What are these tradings ? Let traders hear and change their life ; and if they have been such, be not such ; let them know what they have been, let them forget ; lastly, let them not approve not praise ; let them disapprove, condemn, be changed, if trading is a sin. For on this account, O thou trader, because of a certain eagerness for getting, whenever thou shalt have suffered loss, thou wilt blaspheme ; and there will not be in thee that which hath been spoken of, ' all the day long thy praise.' But whenever for the price of the goods which thou art selling, thou not only liest, but even falsely swearest ; how in thy mouth all the day long is there the praise of God ? " He points out that some MSS. have *litteraturam* instead of *negotiationem* ; and adds, " Let us inquire then how to understand literature also, lest we offend grammarians in the same way as we did traders a little before ; because a grammarian too may live honourably in his calling and neither forswear nor lie." Augustini, *Opera*, iv, col. 886–888. Migne, *Patrologiæ Cursus Completus*, T. xxxvi. See P. Sabatier, *Bibliorum sacrorum Latinæ versiones antiquæ*, T. ii, p. 141, Remis, 1743, fol. The Septuagint reads πραγματείας (= *negotiationes*), with γραμματείας as a variant. This, says Titelmann, is the cause of the difference in the Latin version, the Roman version following one set of MSS. and the Gallic version another. *Elucidatio in omnes Psalmos juxta veritatem Vulgatæ et Ecclesiæ usitatæ æditionis*, p. cxlii *verso*, Paris, 1545, fol. He mentions, *Annotationes*, p. xxx, that the Hebrew gives *numerum*. The Latin version of the Hebrew by Professor Ulcôck of Olmusk reads : " Os meum enarrabit iustitiam Tuam, quotidie auxilia Tua, quorum non novi numeros " (*Psalterium*, p. 287, Olomucii, 1890, 8vo).

The Roman Breviary, following the Sixtine text, reads *litteraturum*, and John, Marquess of Bute, translates the verse : " And, because I know not the tale thereof, I will go in the strength of the Lord " (*The Roman Breviary*, I (Summer), p. 55, Edinburgh, 1879, 8vo).

[2] Apparently = *a papyro*. *Cf.* Deed of 1383. *Ordinat. Reg. Franc.*, vol. vii, p. 44, art. 42 : " Tenebuntur fideliter scribere in eorum papiris et manualibus," quoted by Du Cange, *s.v.* Manuale ; see also *Ib.*, *s.v.* Papirus. *Papyrus*, in the time of the glossators, meant paper made of cotton rags. Linen paper was not invented until the fourteenth century. Savigny, *Geschichte d. röm. Rechts im Mittelalter*, iii, pp. 577 *sqq.* (Heidelb., 1834, 8vo).

alteration of a single letter, all of which has been repeated in our day in reference to documents copied by the type-writer.[1] It was also suggested that the abacus was unfitted for showing a sum, since names have been invented for that purpose, and it would be unreasonable to use letters with the force of words.[2] These objections were overruled. The sheet, it was decided, contained debits and credits, and was written in the form of an account, was, in the case under consideration, subscribed by the person rendering the account, and had been acknowledged by his heirs. Custom recognized the manner of writing by means of the abacus and the use of symbols in the place of words. Facility for alteration was no valid ground of objection, as inspection would readily show whether there had in fact been an alteration. Cyphers, it was said, are used by princes, and animals were used by the ancient Egyptians in place of words.[3] While this is so, it is to be kept in view that in the year 1299 there was a law made in Florence forbidding the use of the abacus in book-keeping, on the grounds just mentioned, and prescribing the use of Roman figures, or the writing out of the numerals in words. It was thought that the algorithm, that is, notation by 9 figures and zero or the valuation of figures by position, might afford ground for fraud, and that the old method was safer.[4]

The business books of Jewish traders are to be received in evidence, although they are written in their own language and characters, and require an interpreter for explaining them.[5]

It was a moot question whether the books of retailers and tradesmen were to be received in evidence.[6] Lawyers—advocates, procurators, and notaries—kept fee books (*registra* s. *libri rationum*

[1] Simpson's *Trustees* v. *Macharg* and Son, January 31, 1902, 39 S.L.R., 562; 9 S.L.T. 398.

[2] This is the abacus of the Middle Ages. It is described by Cajori, *History of Mathematics*, p. 122, New York, 1897, 8vo.

[3] *Decisiones Rotæ Genuæ de Mercatura*, Dec. 96, p. 215.

[4] Cantor, *Geschichte der Mathematik*, ii, p. 144 (Leipzig, 1892, 8vo).

[5] Johann Gottlieb Heineccius (1681–1741), *Opuscula varia*, Exercit. xiv, § 31, p. 564 (Halæ Magd., 1735, 4to).

[6] See Augustin Leyser, *Meditationes ad Pandectas*, Specimen 279, vol. iii, and iv, p. 1126, Lipsiæ, 1743, 4to. He holds that they should be received. A merchant (*mercator*) is, he says, one "qui merces minutatim vendit," which corresponds with the old Scots acceptation of the term. See also Heineccius, *Op laud.*, Exercit. xiv, § 32, pp. 565, 566.

The regulations of the German Commercial Code of 1897 regarding the keeping of trade-books does not (art. 4) apply to artisans or to persons whose business does not exceed the limit of a mere handicraft.

s. *salariorum*) which were admitted in evidence in the same way as merchants' books.[1]

Another question was whether if a merchant or banker kept two books of account, the one concerning the moneys of his bank, and the other touching his trade of merchandise or wares, they shall be evidence alike for such moneys as he oweth unto his creditors? "Judges of Merchants," says Malynes, held that there was no difference, but the civilians, as represented by Benvenuto Straccha, held that the bank books being public and the other being private, the former are to be preferred.[2]

[1] Jacob Coren, *Consilia*, no. 29, p. 135, Hag. Com., 1641, 4to. The author was a learned lawyer, son of Gerard Coren, burgomaster of Alkmaar, and was appointed assessor in the Supreme Court of Holland, Zeeland, and West Friesland in 1621. He died in court, October 24, 1631.

[2] Malynes, *Lex Mercatoria*, c. 20, p. 250 (London, 1656, fol.).

LAW-MAKING BY GOVERNMENT DEPARTMENTS.

[*Contributed by* Sir Lynden Macassey, K.C., *Honorary Editor.*]

Delegated, or subordinate, legislation is the admirably descriptive title which, in his classic treatise, *Legislative Methods and Forms*, Sir Courtenay Ilbert has bestowed on this, our most prolific, source of "written law." Time was when the proportion of the law made by authorities and persons whom Parliament had entrusted with legislative power was small and, indeed, insignificant in comparison with the amount of law derived from the other two sources of "written law"—the Crown under the surviving remnants of the prerogative, and the King in Parliament. But with the increasing complexity in national and imperial conditions—social, political, economic,—the proportion has changed entirely, as, indeed, was inevitable, and the power vested to-day in Government Departments to make law excites, in many quarters, considerable misgiving. Parliament, certainly since 1832, has not had time itself, nor apparently the necessary experience, to undertake all legislation; it became increasingly necessary to appoint trustworthy and expert agents to relieve it of part of the responsibility. When intricate, especially technical questions, come up for legislation, Parliament now habitually contents itself with enacting general principles, leaving their working out and application to whatever Government Department is reputed to have the requisite technical knowledge, industrial or other experience. But the pinch of any general principle lies mainly in its application. The need, too, for quick executive action by Government during times of emergency or crises, when the urgency of pressing circumstances precluded delay until legislative power could be obtained from Parliament, has also been a contributing cause for the delegation by Parliament of large powers of law-making to Government Departments for exercise in, or as against, such contingencies.

Before the war, the legislative power delegated to Government Departments to amend, extend, vary, repeal, apply, commence, or

terminate Acts of Parliament had become enormous; during the war, of course, it attained prodigious dimensions, for, to quote Lord Justice Scrutton in *Ronnfeldt* v. *Phillips*, (1918) 35 T.L.R. at p. 47—" war cannot be carried on according to the principles of Magna Carta." But, even before the war, the increasing predilection of Parliament for delegating legislative power was arousing considerable apprehension in the minds of some lawyers. The late Master of the Rolls (Lord Cozens Hardy) made this statement on May 3, 1911 (see *The Times*, May 4, 1911, p. 10):

> He had seen signs of attempts by the Executive to interfere with the Justiciary, and against all such attempts he thought he could pledge his colleagues and himself to offer a strenuous resistance. There was another danger connected with the Executive. In recent years it had been the habit of Parliament to delegate very great powers to Government Departments. The real legislation was not to be found on the Statute Book alone. They found certain Rules and Orders by some Government Departments under the authority of the Statute itself. He was one of those who regarded that as a very bad system, and one attended by very great danger. For administrative action generally meant something done by a man whose name they did not know, sitting at a desk in a Government office, very apt to be a despot if free from the interference of the Courts of Justice.

Delegated Legislation of a Public Character.—To obtain some conception of the output of delegated legislation one has only to turn to the *Index to the Statutory Rules and Orders in Force on December* 31, 1919 (H.M. Stationery Office, £2 2*s*. net.)—a triennial publication—the issue in question consisting of 1032 closely printed pages giving references to, though not the texts of, the current Rules and Orders; or to the *Statutory Rules and Orders issued in the year* 1921" (1691 pp., H.M. Stationery Office, £2 10*s*. net.) an annual volume giving the texts of many of the Rules and Orders made in that year. These quite invaluable publications are edited by Mr. Alexander Pulling, C.B.—the editor of the *Revised Statutes* and the inventor of the present system of collecting and classifying the Statutory Rules and Orders afterwards adopted by the Government —and his assistant Mr. Cecil T. Carr, LL.D., to whom the legal profession and the country owe a deep debt of gratitude. Without their clear and comprehensive classification, arrangement and indexing, a large part of the public would be ignorant of, and unable to ascertain the laws that govern them, and confusion would reign supreme. But not all rules and orders are printed textually in the annual

volume of *Statutory Rules and Orders*—only those of public and general interest, and none of a local, personal or temporary character. That is, in no sense, an omission of the learned editors; it is the effect of s. 3 of the Rules Publication Act, 1893, and the Regulations made under that Act by the Treasury dated August 9, 1894. When, in that volume, one refers to the list of statutory orders of a local character which are arranged under the same classes as local Acts used to be in the classified list of local Acts published up till 1920 in the 8vo volume of Statutes, one reads an imposing list of local statutory orders, none of which is printed in full, but some of which, as an attached note states, are printed singly and obtainable from the King's Printers. These local statutory orders are many of them most far-reaching; they include orders by the Ministry of Transport for compulsory acquisition of land, user of mechanical power on tramways and railways, increase of railway and tramway rates and fares and dock dues, and all kinds of legislative orders by the Ministry of Health and other Government Departments. Of the public rules and orders, not all of them are printed in the annual volume; none is included which is of an executive rather than a legislative character, or which is in the nature of confirmations or approvals of by-laws, etc., or which is in virtue of a previous rule or order and not of Act of Parliament, or which is made under the prerogative; though of this latter class the annual volume does include those which deal with coinage, appeals to the Judicial Committee of the Privy Council, or constitutions of different parts of the Empire. Finally, the annual volume is not allowed to contain "provisional" rules and orders, *i.e.* those which on the grounds of urgency are excluded from the Statutory Rule and Order System by virtue of s. 2 of the Rules Publication Act, 1898, but which have just as much validity and duration (till superseded) as the Statutory Rules and Orders which have to run the gauntlet of the procedure under s. 1 of that Act. A Government Department, by alleging "urgency," can wholly evade that Act. If we are to be governed mainly, as really is the case to-day, by Government Departments under delegated power, then surely all legislative provisions whatsoever in the form of rules or orders should without exception be printed, published and circulated as fully, expeditiously and cheaply as the public or private statutes. That is clearly an unquestionable right of the public, which no consideration should be permitted to defeat. The work done, and so ably done, by Mr. Pulling and Mr. Carr should

not be restricted, as it is to-day, by the limitations of an antiquated, and, as its history shows, largely fortuitous statute—the Rules Publication Act, 1893—or the archaic and wholly insufficient Treasury Regulations made under it. Their work should be enlarged, and their resources expanded so as to assure the fullest possible publicity of the law that is being almost daily enacted in the cloistered recesses of Government Departments.

Safeguards for Delegated Legislation of a Public Character.—Mr. Cecil Carr performed a very notable public service in publishing his recent book on Delegated Legislation, which was so appreciatively reviewed by Sir Courtenay Ilbert in the issue of this *Journal* for February 1922. It is a most interesting and eminently readable book, replete with information and conspicuous by its breadth of view and balanced judgment.

The necessity for some delegation of legislative powers is inevitable and Mr. Carr's authoritative enumeration of the safeguards which are required is of prime importance. "We want," he says, "five things particularly. First—delegation of legislative power only to trustworthy authorities which command the national confidence. Secondly—definite delimitation of the boundaries within which the delegated power is to be exercised. Thirdly—consultation with interests affected, before exercise of the delegated power. Fourthly—publicity. Fifthly—machinery for revoking or amending legislation made under delegated powers." These safeguards are worth careful consideration. Every Government Department naturally considers itself as entitled to command public confidence; that some do not succeed, is notorious; this safeguard, therefore, though in purpose wholly admirable, is in practice difficult to secure. The second safeguard is emphatically necessary, and it is one to which Parliament pays but scant attention. Almost invariably much greater powers of subordinate legislation are conferred upon Government Departments than the necessities of the case, present or prospective, demand, merely because (*a*) it is easier in drafting to adopt wide general terms than to select apt particular words, and (*b*) a Government Department naturally presses for the widest possible legislative powers, contending that the question of how far those powers are to be exercised is an administrative matter to be left to its discretion, and having well in mind the fact that if it passes beyond the confines of its rule-making authority, the Courts will not hesitate to declare the rule *ultra vires*, as in *Chester* v. *Bateson*, (1920) 1 K.B. 829; *Newcastle Breweries* v. *The*

King, (1920) 1 K.B. 854. As to prior consultation with affected interests, that clearly ought to be obligatory in all cases, save in dire emergencies, and Parliament is showing a gratifying inclination to enforce that preliminary. But the first essential is adequate notice, and in this regard, without question, the Rules Publication Act, 1893, requires, as indeed Mr. Carr clearly shows, to be superseded by a more extended and comprehensive Act. S. 1 of that Act, which requires forty days' notice to be given in *The London Gazette* (the section does not apply to Scotland) of the intention to make statutory rules only applies to rules to be made by a Government Department under an Act which directs the rules to be laid before Parliament. The section does not apply to a very large number of statutory rules, namely (1) all with few exceptions which are local and not public and general; (2) all "orders" as distinct from rules; (3) rules under an Act which does not provide for their being laid before Parliament; (4) rules of which a draft is to be laid before Parliament for a prescribed period before the rules come into operation; (5) rules made by the Ministry of Health as the successor of the Local Government Board, the Board of Trade, the Revenue Department, the General Post Office, the Board of Agriculture under the Contagious Diseases (Animals) Acts; and some other categories of statutory rules. Even where it applies, s. 1 is an illusory safeguard. It tells a Department to publish a draft of the proposed rules for criticism. It does not prevent the Department (as has been done) from omitting a controversial paragraph from the draft, yet inserting it in the ultimate order. The need of publicity—that is to say, the printing and publication of all statutory rules which Mr. Carr enumerates as the fourth safeguard—is vital. His point about the need for machinery for amending or revoking delegated legislation deserves attention. The Interpretation Act, 1889, s. 32 (3), has provided that if a statute gives power to make rules, regulations or by-laws that power, unless the contrary intention appears, is to be construed as including a power to revoke or vary them, but "orders" of Government Departments are not rules, regulations or by-laws within the meaning of that Act.

Parliamentary control is lamentably lax over delegated legislation, and needs tightening up. There are various expedients available—Mr. Carr classifies them: to provide in the authorizing Act for the laying before Parliament for a prescribed period of the draft rules as proposed to be made, leaving Parliament free to take any action it likes; or insertion of the provision that no further

proceeding shall be taken on the draft, as in the Prison Acts, on an address being presented by either House ; or unless approved by a resolution of both Houses—the procedure stipulated in the case of orders under the Safeguarding of Industries Act, 1921. Frequently it has been provided, as in the Housing Act, 1919, that the rules when made shall be laid before Parliament and that Parliament may annul them within a prescribed period, without prejudice to anything done under them up to the date of annulment.

In spite, however, of all safeguards a growing number of persons, like the late Master of the Rolls, regard the increasing delegation of legislative power as " a very bad system and one attended by very great danger." The flood of restrictions and regulations with the force of law that overspread the country during the war opened the eyes of the public to the extent to which liberty may be imperilled by such a system. No safeguard can possibly provide against the chief inherent objection. Government Bills are forced through Parliament under the pressure of the Government whips ; there is little time for discussion of their provisions either in the House or in Committee ; legislation is passed in the most general terms and left to some Government Department to apply as it thinks fit under machinery or rules to be made by it ; the Cabinet is therefore in a position through its member at the head of a Government Department to embark on a particular policy which has never in any detail been discussed in Parliament or communicated to the public. If the action of the Department is challenged in the House, the Government can say, as has been done, that the action of the Department is fully within the powers conferred upon it by the Legislature. Not merely in Great Britain, but in the Dominions, there is a rising feeling of hostility to legislation by Government Departments, except in cases plainly necessary—a sentiment to which undoubtedly some attention is over-due. There are many weighty reasons against making legislation the handmaid of administration instead of mistress.

Delegated Legislation of a Local Character.—Mr. Carr's most illuminating book dealt mainly with delegated legislation of a public and general character. That of a private or local nature he did not discuss at any length, and it is to be hoped that in the second edition, which will sooner or later be called for, the scope of the book may be widened. Just as there are public Acts—those measures of public policy in which the whole community is interested—and

private Acts—measures for the public benefit but at the same time for the particular benefit of some corporation, body or person, the promoters of the Bill, *e.g.* railway, harbour, dock authorities, etc.—so also is there delegated legislation of a local, private or special character, as well as of a public or general character. A private Bill in the British Legislature commences its career and passes into law in a way and subject to procedure wholly different from a public Bill. In regard to private Bills the Standing Orders and practice of Parliament impose most stringent provisions in regard to notice to all affected ; deposit in Parliament of the Bill as solicited ; information of the purposes of the Bill by deposit of plans and other documents ; compliance with many requirements ; and most careful scrutiny by the authorities of both Houses of all Bills, whether opposed or unopposed, and in addition consideration of opposed Bills by select committees before whom promoters and opponents may appear by Counsel and witnesses.

Many matters which used to form the exclusive subject of legislation by private Bills have now been delegated by Parliament to Government Departments. The orders of those Departments, which represent their legislative determination on the provisions which they think should be made in regard to such matters, fall into two main categories : those which are subject to confirmation or scrutiny by Parliament, and those which require no such formality, but have the force of law without any further reference to Parliament. In the first category, "Provisional Orders" hold the first place. "Under various Acts of Parliament" (see Sir T. Erskine May's *Parliamentary Practice*, 12th ed. p. 762) "most of the Departments are now empowered to issue provisional orders (usually upon the application of parties interested) which in their scope and object are practically private Bills, or to make provisional orders (in many cases on their own initiative) for other purposes. The objects obtainable by provisional orders are limited to those specified by the particular enabling Act. Such orders are scheduled to a Bill which is brought in by the Government Department and which declares the expediency of their confirmation ; and in this form they are submitted to Parliament for consideration." Departments in most cases hold a preliminary local inquiry into the expediency of granting a provisional order, and the Provisional Order Confirmation Bill, which is afterwards introduced into Parliament to confirm the order, is a public Bill, but if opposed it is formally referred to a Select Committee in each House for consideration.

Akin to provisional orders are such orders as those granted by the Electricity Commissioners, under the Electricity (Supply) Act, 1919, which are of a most important and far-reaching character. These, when confirmed by the Minister of Transport and presented to Parliament and approved with or without modification by a resolution passed by each House, come into operation and have the force of law as if enacted in the Act of 1919 itself. Somewhat analogous are the " special orders " which the Board of Trade can make under s. 10 of the Gas Regulation Act, 1920. But before any special order is made a draft thereof must be laid before both Houses of Parliament, and if both Houses by resolution approve the draft with, it may be, modifications, the Board of Trade may make an order in the form approved, whereupon the special order has full legislative effect.

Then there have been certain Acts under which Government Departments have been authorized to make legislative orders of a private character. The proposed order must be laid before Parliament, and if Parliament does not disapprove within a specified time the order takes the force of law. For example, under the Public Utility Companies (Capital Issues) Act, 1920, an order can be made, which becomes law if laid upon the table of each House for 21 days, authorizing a statutory company to increase its borrowing powers up to one-half of its nominal share capital. The effect is often to enable companies to avoid all parliamentary control for a much longer period than Parliament intended when they obtained their last private Act.

Parliament has also delegated powers to Government Departments to make legislative orders of the character of private Acts which require no confirmation, approval, consent or scrutiny of any kind on the part of Parliament. Under the Light Railways Act, 1896, the Light Railway Commissioners were empowered to make orders authorizing the construction of light railways and the compulsory acquisition of land for that purpose, and such orders, when confirmed by the Board of Trade, acquired the same force as the private Acts of Parliament for which they were substituted. Later, under s. 68 of the Railways Act, 1921, Parliament conferred the most extreme powers of final legislation on the Ministry of Transport. For the Light Railway Commissioners, as the makers of the order, the Ministry of Transport was substituted ; for the Board of Trade, as the confirmers of the order, the Ministry of Transport was also substituted ; so that the effect is that an officer

of the Ministry makes an order which later is confirmed by the Minister, and so acquires all the powers of an Act of Parliament. There are numerous other types of final orders by Government Departments, see the specially wide powers of the Ministry of Transport under s. 12 (b) of the Ministry of Transport Act, 1919, and ss. 7 (4) 10 and 14 (3) of the Roads Act, 1920, references to which are set out in the list of Statutory Orders of local effect in the annual volume of *Statutory Rules and Orders*. In 1921 about 1,400 Statutory Rules and Orders of a local character were made, and in 1922 over 1,000. Only one-half were printed.

Parliament has further delegated to bodies and persons who are not Government Departments the power of making rules, orders and regulations having the force of law, in some cases subject to confirmation by Government Departments, in others, of themselves final and requiring no confirmation. Examples of the former are by-laws by railway companies and municipal corporations which require for validity confirmation by the Ministry of Transport or the Ministry of Health respectively. Confirmation of a by-law, however, by the confirming authority does not make valid what is otherwise invalid, as, for example, a by-law beyond the powers of the by-law-making authority, or unreasonable, or uncertain, or repugnant to the general law. A County Council can, under s. 57 of the Local Government Act, 1888, and s. 42 of the Local Government Act, 1894, make an order converting a rural district into an urban district, or extending the boundaries of an urban district to include portions of rural districts, and once such order has been confirmed by the Local Government Board—now the Ministry of Health—it is, at the expiration of six months therefrom, deemed to have been duly made and to be within the powers of s. 57 and no objection to its legality may be entertained in any legal proceeding whatever. Again, certain bodies and persons, not Government Departments, have been empowered to make orders, rules and regulations which, without any confirmation by anybody, have the force of law, as, for example, the statutes and by-laws which, in olden times, though not now, certain colleges and universities were entitled to make. Another example is the provision in the Railway and Canal Traffic Act, 1854, which provided in general terms that a railway company should afford due and reasonable facilities for traffic; what those facilities should be under the circumstances of each particular case—and the decision is obviously a matter of law-making and not of judicial interpretation—was left to the Railway and Canal

Commission Court. Against the decision there is no appeal on questions of fact, but, under s. 17 of the Railway and Canal Traffic Act, 1888, an appeal lies on questions of law to the Court of Appeal, but only in case of difference between the decisions of any two Courts of Appeal in Scotland, Ireland or England, to the House of Lords.

It is customary in private Acts for Parliament to give the promoters general powers to carry out certain prescribed purposes and to provide that the vital questions of the terms and conditions on which the powers may be exercised shall, in case of difference between the promoters and persons affected thereby, be determined by a Government Department or an arbitrator, coupled with the provision in some cases that the Arbitration Act, 1889, shall not apply to any such determination. If that Act is so excluded, persons affected by the decision are deprived of their chief remedy of testing it. Another instance is afforded by all recent private Acts authorizing local authorities to run omnibuses on public highways. Those Acts require the parties concerned to submit to the Minister of Transport for final determination the question whether the omnibus authority should make a special contribution towards the cost of reconstructing the highway, and takes away that authority's right to have that question determined by the Courts as a claim on liability for extraordinary traffic under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898.

Safeguards for Delegated Legislation of a Local Character.—An important question arises as to what safeguards exist in respect of orders of the nature of private Acts which are made by Government Departments. To the whole practice of legislation by provisional order, notwithstanding the convenience, in many cases, of the procedure, weighty objections have been advanced. The provisional order is made by a Government Department, and that Department is firstly responsible for the administration of the Act under which the order is made; and, secondly, has the responsibility of acting in a judicial capacity and deciding, as the result of a local inquiry, between the conflicting arguments of the promoters and opponents of the scheme; and then, thirdly, has to act in a legislative capacity in making the provisional order. There is thus a conflict of interest and a confusion of capacity which cannot easily be reconciled. It is only due to the outstanding integrity of the British Civil Service that serious questions have not arisen. In his

History of Private Bill Legislation (1887) Mr. Frederick Clifford in vol. ii, at p. 715, deals with this point. Quoting the opinion of an authority, he says: "This blending of administrative and judicial functions would appear in a strange light if one could conceive the judges of some Division, say the Queen's Bench, first recommending people to go to law upon certain lines, then sitting to administer justice indifferently between them and then, if their decree failed to give satisfaction, proceeding to assist in arguing the case in person before the Court of Appeal." This latter reference is to the custom of Government Departments responsible for provisional orders sending representatives to appear before the Committees of Parliament, and give evidence in support of the orders. Until recent times, a departmental representative attended the Committee and sometimes made a statement at the close of the case, and neither promoters nor opponents could cross-examine him. Now the representative usually gives evidence in support of the Order at the close of the promoters' case, and, under the ruling of certain strong chairmen of Select Committees, both promoters and opponents may put questions to him, but may not freely cross-examine.

Assuming, however, that a provisional order, or an order like one under the Electricity (Supply) Act, 1919, is *ultra vires*, the question arises as to the remedies available against the assumption by a Government Department of unauthorized legislating power. To appreciate the position it is necessary to refer to the powers and attitude of the Courts in regard to intervention in parliamentary proceedings. The Courts may, in appropriate cases, restrain persons improperly charging on public or trust funds the expenses of promoting or opposing an Act of Parliament; but they disclaim all right to interfere with proceedings in Parliament, either in regard to public or private legislation. In certain cases the Courts have a theoretical right, which in practice is seldom exercised, to restrain parties from making an improper application to Parliament; but this is a right which will only be exercised *in personam* as against the applicant and seldom, even if proper cause existed, after the application had been actually presented to Parliament, because interference with the promoters at that stage necessarily implies interference with the parliamentary proceedings themselves. See Lord Brougham's opinion in *Ware* v. *Grand Junction Water Co.* (1831) 2 Russ & M. 470, at pp. 483–4, and that of Cottenham, L.C. in *A.G.* v. *Manchester and Leeds Railway Co.* (1838) 1 R. & C. Cases 436, at

p. 455. Later, in *Heathcote* v. *North Staffs. Rly. Co.* (1850) 2 Mac. & G. 100, at p. 109, Lord Cottenham said :

> In a proper case, therefore, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of this Court by injunction touching proceedings in Parliament for a private Bill or a Bill respecting property ; but what would be a proper case for that purpose it may be very difficult to conceive. The case of Parliament differs widely from that of the Courts of common law. The province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal rights ; but the ordinary province of Parliament in such Bills is to abrogate existing rights and to create new rights. To hold, therefore, that no application should be made to Parliament because the object of the application was to interfere with some right or interest of some other party would be in effect to hold that this Court should by its injunction deprive the subject of the benefit of parliamentary interference in all such cases.

In later cases the Courts have made quite clear their strong disinclination to restrain persons applying for and promoting Acts of Parliament. See *Lancaster and Carlisle Railway Co.* v. *North-Western Railway Co.* (1856) 2 K. & J., 293, at p. 303 ; *Steel* v. *North Metropolitan Railway Co.* (1867) 2 Ch. 237, at p. 240 ; *In re L.C. & D. Rly. Arrangement Act, ex parte Hartridge and Allender*, 5 Ch. App. 671 at p. 679. Even where the proposed application was *ultra vires*, or one in breach of contract, or in plain violation of a specific obligation not to go to Parliament, injunctions have been refused.

To restrain opposition to a Bill is a different matter from restraining promotion, and Cottenham L.C., in *Stockton and Hartlepool Rly. Co.* v. *Leeds and Thirsk Rly. Co.* (1848) 5 R. & C. Cases 691, decided that the Court has just the same jurisdiction to restrain a party from petitioning against a Bill in Parliament as if he were bringing an action at law or asserting any other right connected with the enjoyment of the right or property which he claimed. But the Hartlepool Railway case cited by Sir T. Erskine May on p. 609, *op. cit.*, which is not reported, appears to be the only instance in which an injunction has been granted against a person opposing a Bill. It is difficult, however, to conceive circumstances in which the Courts will be prepared to restrain a person from promoting or opposing a Bill in Parliament. To prevent a Government Department exceeding its powers in making a provisional order or to rescind, in whole or in part, a provisional order when made is not, therefore, an easy matter to achieve by means of legal process.

Halsbury's *Laws of England*, vol. x, states, in par. 303: "Prohibition will not issue to any person or body of persons who may be acting judicially but not as a judicial tribunal, nor against the ministerial or executive acts of the Government"; and in the footnote: "In such a case the remedy would be by *certiorari*." Again, par. 338 says: "*Certiorari* lies only in respect of judicial as distinguished from ministerial acts." An examination of the cases is of importance.

In *Reg.* v. *Hastings Local Board* (sometimes reported as *Frewen* v. *Hastings Local Board*, (1865) 6 B. & S. 401, 34 L.J., Q.B. 159; 12 L.T. (N.S.) 346), the Queen's Bench discharged a rule *nisi* for *certiorari* to quash a provisional order of the Secretary of State which he had made after holding a local inquiry under s. 75 of the Local Government Act, 1858, authorizing the Local Board to acquire compulsorily certain land. The Court, Cockburn C.J., Blackburn J. and Mellor J., discharged the rule on the ground that the provisional order had no effect until converted into law, and that if made without jurisdiction the Select Committee of Parliament adjudicating on the Bill would reject it. The Court held that the provisional order was not a judicial determination such as would justify the Court in removing it, and that even if the Secretary of State, in making the order, overstepped his authority there was nothing in the Act of 1858 which would give the Court authority to quash it. On the other hand, in *Russell* v. *Magistrates of Hamilton, the Secretary for Scotland, and the Sheriff of Lanarkshire*, (1897) 25 Rettie 350, the Scottish Courts restrained the Corporation of the Burgh of Hamilton from prosecuting an application for a provisional order under s. 45 of the Burgh Police (Scotland) Act, 1892, for a purpose which the Courts held was not authorized by that section, and also restrained the sheriff from holding a local inquiry into the merits of the application, as he had been directed to do by the Secretary for Scotland under s. 46 of the Act, and restrained the latter from further dealing with the application. This decision proceeded on the principle that if Parliament has delegated certain limited powers of law-making to a Government Department the public is entitled to be protected against the Department exceeding its jurisdiction, and, although the case was one of injunction, it cannot easily be reconciled with the English decision in *Reg. or Frewen* v. *Hastings Local Board*, which was a case of *certiorari*.

Once, however, a provisional order has reached the stage of being scheduled to a Bill introduced into Parliament for its con-

firmation, the Courts will not interfere. When, in *Telford* v. *Metropolitan Board of Works*, (1872) L.R. 13 Eq. 574, Bacon V.C. injuncted the defendants from promoting a provisional order under the Inclosure Acts, on the ground that the scheme of the order constituted a breach of contract with the plaintiffs, the order had not reached Parliament.

It is usually claimed by Government Departments that the making of a provisional order is not a judicial act, but that contention is very doubtful if one considers the later decisions on the essence of a judicial act, for example, the judgment of Lord Esher in *R.* v. *L.G.B.* (1882) 10 Q.B.D. 309, at p. 317, and the luminous judgments of the judges of the Irish Court of Appeal in *Reg.* (*Wexford County Council*) v. *Local Government Board for Ireland*, (1902) 2 *I.R.* 349. In this last case Chief Baron Palles said, at p. 373:

> I have always thought that, to erect a tribunal into a "Court" or jurisdiction so as to make its determinations judicial, the essential element is that it should have power by its determination within jurisdiction to impose liability or affect rights; by this I mean that the liability is imposed or the right affected by the determination only, and not by the fact determined, and so that the liability will exist or the right will be affected although the determination be wrong in law or in fact. It is otherwise of a ministerial power.

It may be that, although a provisional order does not become of the force of law until confirmed by Act, the rights and interests of persons affected may be seriously endangered, and urgent necessity imposed on them of incurring very considerable expense to protect themselves. If prohibition or *certiorari* is not to lie because an order is not final—apparently one of the grounds of the decision in the Hastings case—then, in regard to orders not provisional but depending for validity upon being laid upon the Table of the House, opponents affected by *ultra vires* would have no legal protection. In *In re Local Government Board, ex parte Kingstown Commissioners*, (1886) 18 L.R. Ir. 509, a case of appeal against the discharge by the Exchequer Division in Ireland of a conditional order for a writ of prohibition against the Irish Local Government Board in respect of a provisional order claimed to be made in excess of jurisdiction under the Public Health (Ireland) Act, 1878, the Court of Appeal discharged the conditional order, and, though the question was not involved in the decision, Lord Chancellor Naish discussed at length, p. 513, the decision in the Hastings case. He

said: "In my view, what was decided by the Hastings case was that the English Local Government Board was a body to which Parliament had given legislative powers by way of delegation from Parliament's own powers, and therefore the Court could not interfere."

The position is thus summed up by the learned contributors of the Section on Crown Practice in Halsbury's *Laws of England*, vol. x, par. 339:

> There are some acts on the part of tribunals with regard to which, upon grounds of public policy, the writ (*i.e.* of *certiorari*) will be refused, irrespective of the question whether such acts are of a judicial or of a ministerial character. Thus *certiorari* will not be granted to bring up a provisional order made by a Secretary of State which is subject to confirmation by Act of Parliament, for to issue the writ would be to interfere with the functions of Parliament.

If provisional and similar orders are to be unchallengeable in the Courts on the ground of *ultra vires*, then the only available remedy is for an opponent, in the case of a provisional order, to raise the matter in his petition against the confirming Bill in either or both Houses of Parliament. It will then become in the last resort a matter for a Select Committee to consider, and, if they hold that the provisional order is in excess of the powers of the enabling Act, to reject it or amend it. But that can hardly be described as satisfactory. Most technical questions of law and of legal construction, which are more appropriate matters for decision by a Court of Law, are raised by questions of *ultra vires*, and are not suitable for decision by a non-legal committee, even although it may have the assistance of the Counsel to the Speaker or to the Chairman of Committees of the House of Lords as the case may be. But this remedy only applies to provisional orders which can be opposed in Parliament.

The case of orders which do not require confirmation by Parliament stands in a different category. In the recent case of *Rex* v. *Board of Trade*; *Rex* v. *Light Railway Commissioners*, (1915) 1 K.B. 162; 3 K.B. 536, an important decision was given in respect of the remedies available for excess of jurisdiction in the making of an order under the Light Railways Act. Certain promoters applied for an order including twenty-one railways; the Commissioners intimated their intention of granting the application in respect of eighteen only, and to refuse it in respect of three; the promoters, thereupon, contended that their application for a light

railway had been refused within the meaning of sub-section 6 of s. 7 of the Light Railways Act, 1896, and appealed against such refusal to the Board of Trade. The Board of Trade entertained the appeal and remitted the application with regard to two of the rejected railways to the Commissioners for further consideration. The opponents objected to further consideration on the ground that the Commissioners had no jurisdiction to rehear the case, inasmuch as the application of the promoters had not been refused by the Commissioners, and the promoters had no right to appeal therefore to the Board of Trade. The Commissioners decided in favour of their jurisdiction to proceed with a further inquiry, and the opponents took no further part. Ultimately, the opponents obtained rules *nisi* for *certiorari* against the Board of Trade in respect of their order to the Light Railway Commissioners to rehear the case and for prohibition against the Commissioners from proceeding further with the rehearing. It was contended in the King's Bench, on behalf of the Board of Trade, that a writ of prohibition which is a judicial writ addressed to an inferior Court would not lie against the Board of Trade, which is a Committee of the Privy Council. No decision was given on this point, as the Court held the Board had jurisdiction to remit so much of the application as related to the two railways to the Commissioners for rehearing and discharged the rules. In the Court of Appeal the majority of the Lord Justices decided that, according to the true construction of sub-s. 6 of s. 7 of the Act of 1896, an application for a light railway had not been refused and that, therefore, no appeal to the Board of Trade under the circumstances was open to the promoters. The Court of Appeal reversed the decision of the Divisional Court, and made absolute the rule for prohibition against the Commissioners, and also the rule for *certiorari* against the Board of Trade.

That a definite right should be reserved to all opponents to test whether an order made by a Government Department is, or is not, in excess of powers is most important. If an order is one which can be made by a Government Department without any reference to Parliament, then the Courts can deal with it. The fact that an order requires confirmation by Parliament, or, to secure validity, requires an approving resolution by Parliament, or needs to lie for a certain time upon the Table of the House before becoming law, should not place such orders in a privileged position and remove them from judicial control. When a Government Department makes an order which is clearly in excess of powers, is that order to obtain

the force of law once a resolution approving the order is passed by Parliament, probably without any consideration, and the Act authorizing the order has provided that, in the event of such a resolution being passed, the order shall have the same effect as if enacted in the Act? Where such a resolution is passed it would appear that no opportunity remains for any consideration of the order by a Court of Law.

In the case of orders made by Government Departments under the Electricity Supply Act, 1919, and the Gas Regulation Act, 1920, which do not come into force until approved by resolutions passed by each House of Parliament, the Chairman of Committees of the House of Lords moved, on August 2, 1922, a new Standing Order providing that opponents presenting petitions against such orders should be entitled to appear before them, and be heard by a Select Committee, which would report to the House whether, in their opinion, the order should or should not be approved, and in the former case with what modifications. This Standing Order, if and when adopted, will confer substantial parliamentary protection against the making of unauthorized orders, though in one House only.

INTERNATIONAL CRIMINAL LAW.

[*Contributed by* G. Glover Alexander, Esq., LL.M.]

Since my former article on this subject, published in vol. iii, part iv of this *Journal* (October 1921), M. Maurice Travers has published the third and fourth volumes of his important work on *Droit Pénal International*,[1] in which he proceeds to develop the ideas he indicated in the first and second volumes, a short sketch or explanation of which was given in my former article.

Bearing in mind that the system which M. Travers advocates consists in the grouping together of several States or nations for the purpose of administering criminal law, he proposes to study the scheme in three principal divisions, viz. :

1. Les actes qui doivent être accomplis *sur* le territoire du groupement qui a édicté la loi pénale mis en œuvre ;
2. Ceux qui ont été réalisés *hors* du territoire en exécution ou pour permettre l'exécution de la loi pénale d'un autre groupement ;
3. Ceux auxquels il doit être procédé sur le territoire en exécution ou pour permettre l'exécution d'une loi répressive étrangère.

He adds : " Le mot acte sera pris dans son acception la plus large de façon à comprendre même les décisions judiciaires."

A fourth division is devoted to the consequences of annexation. The second and fourth divisions involve the consideration of " le problème de la coopération internationale pour la lutte contre la criminalité."

It would be impossible to follow him step by step through all the ramifications of the subject, the bare outline of which includes : " Mise en œuvre de la loi pénale (1) Actes à accomplir *sur* le territoire ; Actes accomplis à l'étranger en exécution d'une loi pénale étrangère ; poursuites et décisions répressives étrangères : and (2)

[1] *Le Droit Pénal International et sa mise en œuvre en temps de paix et en temps de guerre*, par Maurice Travers, Avocat à la Cour de Paris, Docteur en Droit, etc., tomes iii (pp. 552) and iv (pp. 766), Libraire : Recueil Sirey, Paris (1921) ; tome v, (pp. 759) (1922), *ib.*

Actes à accomplir *hors* du territoire. Coopération internationale : remise de bulletins de condamnation et casiers judiciaires ; mesures d'instruction ; significations : extradition, etc."

It must suffice to say that these leading ideas are worked out in these new volumes in great detail and with much learning. Naturally, M. Travers draws most of his illustrations and authorities from French law : " Loi pénale que nous supposerons toujours, au cours de nos explications, être la loi française sauf indication contraire " ; but he by no means confines himself to French law or the history of French relations with other countries for the putting into operation (" mise en œuvre ") of criminal law. Other systems of law, English, Belgian, Italian, Swiss, and several others are all laid under contribution. Cases, conventions, treaties, and statistics are all invoked in aid of his argument, the foundation of which, as pointed out previously, is the idea of " compétence," which, he says in Article 1157, has a triple aspect, viz. :

1. De quelle souveraineté doit révéler l'autorité judiciaire chargée de procéder ;
2. Quelle est, parmi les juridications dépendant de cette souveraineté, celle qui peut être saisie et peut agir ;
3. Quels pouvoirs lui sont attribués.

As regards " crimes commis sur territoire " there is little or no difficulty. Each State assumes the right to repress and punish crimes committed within its own territory where it has full jurisdiction.

The difficulty arises with regard to crimes committed " dehors de son territoire." As regards these he submits (in Article 1620) the two questions :

1. L'état qui veut agir peut-il être considéré comme exerçant un droit, ou, tout au moins comme usant d'une faculté qui lui appartient ?
2. Les autres pays, tout spécialement celui sur le territoire duquel l'acte avait lieu, peuvent-ils légitimement opposer leur droit de souveraineté ?

And it is these two questions that M. Travers endeavours to answer in the two volumes. It must be confessed that some of the arguments which he adduces and makes use of, in the eyes of an English lawyer trained on our system of jurisprudence, which is still more or less under the influence of Austin, fall rather within the sphere of morals than of strict law. Whenever the word " ought" (" doit," as opposed to " droit ") intrudes, our suspicions are at once aroused. But then the whole subject of International Law,

both public and private, has not yet been brought within the sphere of strict law, as hitherto understood by us. M. Travers's work is designed, so far as it is possible in present circumstances, to bring criminal law within the sphere of international law. In the execution of this project, and in the style and scope of his work, we hardly know which to admire most, the learning and vast industry of the writer, or the ingenuity of his arguments. We are afraid, however, that he will have to wait until the League of Nations becomes an accomplished and accepted fact, with full international powers and jurisdiction, before he sees the fruition of his labours. All we can do is to wish him in regard to them the success they deserve, since they are intended to raise the admiration of international criminal law to a higher level by enlarging its scope and authority and placing it on a firmer basis.

At all events, if the wider conception of criminal law contended for by M. Travers were accepted and acted on it would avoid such absurd results as the decision in the recent case of *Rex* v. *Godfrey* (1922 W.N. 285), where it was held that a man who had not been in Switzerland physically and corporeally was a " fugitive criminal " from that country, and therefore liable to be extradited from this. Lord Hewart, L.C.J., is reported to have said in that case :

> At first sight these words might seem to indicate a criminal who had fled from some other country to this country. But the criminal was not fleeing a country, but was fleeing from the consequences of the criminal acts he had committed there, and it seemed to him that the word " fugitive " was equally satisfied if he were seeking to evade the consequences of being in this country.

To say the least of it this seems like an overstraining of language, though it may be in the interests of justice.

The fifth and final volume of the above-named valuable and important work has just appeared. It deals mainly with the subject of extradition. To this subject, and to the allied subject of *Commissions Rogatoires*, M. Travers devotes the greater part of volume iv, and in the fifth volume he completes it (*suite et fin*). What he says in these two volumes, taken together, constitutes a complete treatise on the French law as to extradition, brought up to date. This, however, by no means exhausts the contents of the fifth volume, which includes a section on the *Action Civile* (appendix i) peculiar to French law (*consacrée par la jurisprudence française*) and a typical treaty of extradition (*Projet de traité d'extradition*) (appendix iv) in addition to a general chronological table

(68 pp.) of all the judicial decisions cited, and a very full index (125 pp.) to all the matters treated of in the five volumes. The second and third appendixes contain suggested provisions of international law for insertion in a Penal Code and Code of Procedure which would have the effect of making *la loi pénale également applicable* hors *du territoire*, subject to certain conditions.

Another book on the same subject has appeared still more recently. It is written by M. H. Donnedieu de Vabres, who is a Professor in the Law Faculty of the University of Montpellier, and it is entitled, *An Introduction to the Study of International Criminal Law*.[1] It claims, justly, to be a historical and critical essay upon "La Compétence criminelle," especially in regard to crimes committed abroad, *i.e.* outside France.

The first observation that occurs to one in taking up this book is that when a subject attains to the dignity of having its history written it has made considerable progress. The author pursues throughout his treatise the historical method.

In his "Préliminaires" he declares that "la compétence des jurisdictions françaises à l'égard des délits commis à l'étranger" is determined by Articles 5 and 7 of the French "Code d'instruction criminelle"; as to which he asserts that "ces textes ne répondent plus aux besoins de la répression internationale." They have been so altered and amended that they are now a thing of shreds and patches "et leur révision s'impose."

"Devant les progrès effrayants de la criminalité internationale, développés par la facilité des communications, une résistance organisée, internationalisée, est nécessaire."

For this state of affairs he blames principally the excessive nationalization of Roman law. "Dans l'antiquité, le nationalisme du droit romain, opposé au cosmopolitisme hellénique, a produit de telles conséquences."

Later on, French monarchic absolutism and German imperialism contributed their quota to this result.

Thus has arisen "Ce culte de la puissance sociale, cette idolâtrie de l'État, dont nous endurons aujourd'hui à d'autres égards, les abominables conséquences."

In chapter i, M. de Vabres deals with the subject in ancient

[1] *Introduction à l'étude du Droit Pénal International; Essai d'histoire et de critique sur la compétence criminelle dans les rapports avec l'étranger*, par H. Donnedieu Vabres, Professeur à la Faculté de Droit de l'Université de Montpellier. Libraire, Recueil Sirey, Paris (1922), pp. 482.

times (L'Antiquité) and points out that "La vengeance est la première forme de la répression." He remarks quaintly: "L'exercice de la vengeance est pour celui qui a subi l'insulte, et pour les siens un devoir et un plaisir!"

He notes (p. 37) that "En Grèce, la compétence pénale est territoriale en principe," and the right of asylum, founded upon the ideas of hospitality and religion, furnished an obstacle to extradition.

In chapter ii, he deals with "Le Droit Pénal Romain" as to which he observes: "L'esprit du droit pénal romain offre, avec celui du droit pénal hellénique, un singulier contraste. La répression, dans les villes grecques, n'était pas impitoyable. Les peines, sauf de rares exceptions, n'étaient pas inhumaines." . . . "Dès l'abord, au contraire, le droit pénal romain suggère une impression de rigueur très grande." Further on he says:

"Or, le droit pénal romain a connu cette fortune singulière. Ce droit, égoïste, nationaliste, impérialiste dans son essence, est devenu le droit commun des états qui devaient constituer, quelques siècles plus tard, la société des États civilisés."

All this, of course, is well known to the average classical scholar and student of Roman law, but it is very well put. The style of this part of the book indeed reminds one strongly of Coulanges' *La Cité Antique*, though, strange to say, he nowhere cites that book as an authority.

Chapter iii he devotes to the Middle Ages ("Le Moyen Âge"), and points out that we now get the application of personal law through contact with the barbaric invaders of the Roman Empire; he lays stress on the jurisdiction of the Church and the personal authority of bishops; and points out the appearance, with the feudal system, of a new personal law, founded upon attachment to the soil.

In chapter iv, he attaches great importance to "La Doctrine Italienne des Statuts (lois municipales)" and "L'École des post-glossateurs." "Les glossateurs étaient des professeurs et des savants." In this connection he deals at considerable length with the works of the mediæval Italian jurist, Bartolus.[1] To Bartolus perhaps more than to any other man appears to belong the credit of the legitimate extension of these "Statuts" outside the actual territory of the city. His work was largely a reaction against the views of Jacobus de Bellovisu, who had gone too far

[1] For the life of Bartolus see the *Great Jurists of the World.*

in this direction ("à admettre largement l'effet extraterritorial du statut pénal"). Bartolus asserted that "statuta sunt jus proprium civitatis," and that their application outside the city was not justified. But he admitted an exceptional jurisdiction in the case of "vagabundi," or wandering bands of robbers, and propounded an ingenious theory ("la fameuse théorie de Bartole") with respect to theft, regarding it as a continuous offence and contending that the robber could be judged wherever he was arrested, provided he still remained in possession of the stolen property. By another ingenious application of the "statutum loci" and the use of the "judex domicilii" he managed to give a certain exterritorial effect to penal sentences and to enforce judgments by means of confiscation, deportation, interdiction of residence, etc. Thus he confined the views of Jacobus de Bellovisu within reasonable and proper limits. M. de Vabres praises highly the originality and method of Bartolus. But M. Laine, of whose work *Introduction au Droit international privé*, M. de Vabres makes considerable use, does not rank Bartolus so highly. He says that his theory was "une théorie fort intéressante, quoique défectueuse en nombre de points, pleine d'aperçus de valeur inégale, mais ingénieuse, savante en somme pour le temps où elle parut"; that "C'est la doctrine italienne," but it was by no means recognized in France in the seventeenth and eighteenth centuries ("nullement la doctrine que l'on connut en France aux XVII^{e} et XVIII^{e} siècles").

The state of affairs in Italy in the Middle Ages, with regard to the execution or enforcement of criminal law, seems indeed to have been somewhat analogous to the state of Europe and the rest of the world at present. Each city or little State had its own local criminal law, but there was no common criminal law for the whole of Italy. Consequently, it was easy for these "vagabundi" to escape the consequence of their crime by fleeing from one city to another. Only at Rome was there anything like a common law ("a Roma, quæ est communis patria"). In the same way, at the present time, there is no common criminal law throughout Europe, and it is the object of the advocates of "droit pénal international," as far as possible, to bring about such a law or system of administration.

In chapter v, M. de Vabres treats of "La compétence pénale" in France from the fourteenth to the sixteenth century and "La formation du Droit public."

In chapter vi, he treats of " L'Absolutism Monarchique " in France in the seventeenth century and its effects " sur la compétence pénale " ; and in chapter vii, he treats of " La Compétence pénale " in the Low Countries from the sixteenth to the eighteenth century, and the formation of " Le Droit des Gens."

Henceforth he deals with the " Successors of Grotius " and modern international law, and the book reads very like Wheaton's *Histoire du Droit des Gens*, but with special application to the end in view, viz., criminal law.

In chapter viii, he describes " Le mouvement doctrinal et législatif " in Germany in the seventeenth and eighteenth centuries, and in chapter ix, he traces " Le mouvement d'idées " in France in the eighteenth century, thus coming down, in chapter, x, to " L'Évolution du droit positif " in France in the nineteenth century, and arriving at " Les Précédents, l'élaboration, la promulgation des articles 5 à 7 de Code d'instruction criminelle," above mentioned, which declared : " Il ne sera retenu sur les galères de France aucun étranger pour crimes commis hors du territoire français. Ainsi se trouvent affirmées : d'abord, la territorialité de la loi pénale ; ensuite, la territorialité de la compétence judiciaire " (p. 403).

All the efforts of enlightened French lawgivers and jurists since then have been directed towards the reversal of this policy, the reform of these articles, the abandonment of the territorial system and the building up of the system of " Compétence personnelle [as opposed to ' nationale '] judiciaire et législative." And the conclusion at which he finally arrives is that it is necessary to choose between the nationalist or realist system and the universalist system, the latter of which alone answers to the actual tendencies of modern times.

Thus he proves his thesis, which is, that the " internationalization " of the criminal law is desirable.

In his " Conclusion " he very justly says :

> Le Pacte des nations n'est pas l'effet occasionnel des aspirations généreuses d'un homme, ou des combinations politiques d'une assemblée de diplomates. Il répond à un besoin de la conscience contemporaine. Il ne convient pas d'apprécier ici sa valeur pratique (p. 361).
>
> La formation d'un droit international pénal implique la substitution d'un régime d'entente au régime actuel qui est celui de l'isolement. Or, la réalisation de l'Entente suppose chez les États, à l'égard de leurs institutions judiciaires, de leurs législations respectives, et de leurs sentences, cette considération mutuelle qui est l'âme du droit des gens (p. 464).

The book is a very interesting and valuable one, and the style is so simple and lucid that it affords easy and pleasant reading. It does not contain the weighty learning and close reasoning of M. Travers's treatise; but "comparisons are odious," and its scope and purpose are very different.

It contains a mass of useful matter on the subject, well arranged.

There is one aspect of M. de Vabres's book that is somewhat humiliating to English jurists. Scarcely anywhere does the author refer to an English authority or quote an English writer, though it abounds in citations of French, German and Italian authorities. It is true that he gives to Bentham credit for the invention of the term "droit pénal international," but he does so on the strength of a German writer (Koenig). There is not a word of English in the book, and it seems rather doubtful whether M. de Vabres knows English at all, so completely are the English language and English writers ignored. Nothing could show more clearly the separation that exists at the present time between English and continental jurisprudence, and the isolation and insularity of the English system of jurisprudence, a state of affairs that is not desirable in the interests of either system. On the one hand, it may be asserted that continental jurisprudence would derive great benefit from the more rigid view of the English school, which would act upon it as a tonic; and, on the other hand, English jurisprudence would be "waked to warmer life" by more frequent contact with continental modes of thought. [See further hereon the article on "The Study of Comparative Law in France and England," by Professor H. C. Gutteridge, in the February (1922) number of this *Journal*.]

M. de Vabres nowhere mentions M. Travers's work—probably because it was not published before his book was written.

As the fifth volume of M. Travers's work was published after M. de Vabres's book, M. Travers has had the opportunity of reading and criticizing M. de Vabres's treatise. In his "Conclusions," therefore, after noting that two very important and interesting events, from the point of view of *Droit Pénal International*, have happened, while his (M. Travers's) work was in course of publication, viz.: (1) the putting of William II upon his trial (*en accusation*) for an offence against *la morale internationale et l'autorité sacrée des traités*; and (2) the putting into force (*en vigueur*) of the Covenant of the League of Nations, M. Travers observes that M. de Vabres regards "*ce double événement*" as the beginning of a new era, and that the old idea of repressive laws, deduced from the interest of the

State, is going to be replaced by a new conception, viz., the idea of justice. This view, however, M. Travers does not think quite correct, nor is the realization of it in his opinion altogether desirable:

Mais l'idée de justice n'a nullement été et ne doit pas, dans l'avenir, être substituée à celle d'intérêt de l'État.

Les deux notions continuent et doivent continuer non à s'exclure mais à se combiner.

THE MINISTRY OF LABOUR OF GREAT BRITAIN.

[Most countries find themselves confronted at the present time with many pressing problems, of industry and labour. A substantial number are either forming, or are developing already formed, Government Labour Departments in order to secure uniform administration of these problems along consistent lines of policy. It has been represented to the Society that it could assist some of its readers in such countries by printing in the *Journal* an account of the constitution and organization of the Ministry of Labour of Great Britain. To afford that assistance an article has been secured from an authoritative source of which this is the first instalment. The second will appear in the November number of this year.—EDITORS.]

The Origin of the Ministry.—The Ministry of Labour was formed in December 1916, and the first point that had to be decided was the scope of the new Ministry.

The legislation of Great Britain contains many laws in regard to labour—some of which have been on the Statute Book for a very considerable period—the administration of which is distributed among various Government Departments. Thus, in addition to the Ministry of Labour, whose functions will be described in some detail in this article, the following Departments are interested in some aspects of the labour problem :

Home Office.—Factory and Workshop Acts and allied legislation dealing with the hours of employment of women and young persons, the health and safety of workers, dangerous and unhealthy trades, etc. ; also the Shops Acts regulating the hours of employment of shop assistants, and the Workmen's Compensation Acts dealing with compensation in the event of accidents arising out of and in the course of a workman's employment.

Board of Education.—The employment of children is also to some extent dependent on the Education Acts.

Board of Trade.—The Mines Department of the Board of Trade administers the Acts regulating the hours and conditions of employment of persons employed in mines, and is also responsible for the administration of the Coal Mines (Minimum Wage) Act. The Board of Trade, through the Mercantile Marine Offices and the Merchant Shipping Acts, is also concerned with seamen's conditions of employment.

Ministry of Health.—Health Insurance Acts dealing with the insurance of workpeople against sickness and Poor Law Relief.

Registrar of Friendly Societies.—The registration of trade unions, co-operative societies, friendly societies, etc., and the general administration of the Trade Union Acts.

The Ministry of Agriculture has certain activities in regard to agricultural labour.

There are also certain Statutes, such as the Trade Disputes Act, 1906, which do not entail administration by a Government Department.

The establishment of a Ministry of Labour had been under consideration for many years before the Ministry was finally established in December, 1916.

Thus, the establishment of a Ministry of Labour was proposed in the Minority Report of the Royal Commission on Labour in 1894. It was again proposed in the Minority Report of the Poor Law Commission in 1909. There has also been introduced into Parliament a succession of Bills proposing to deal with the setting up of a Ministry of Labour. In some Bills it was proposed to combine Labour and commerce in one Ministry and in others to combine labour with the relief of destitution.

It may be convenient to note that, at the Trades Union Congress in 1915, the following resolution was unanimously carried :

This Congress calls upon the Government to appoint a Minister of Labour with full Cabinet rank. That all Departments of Labour shall be co-ordinated under the said Minister's supervision, and to include a Statistical Department, which shall enumerate the number of persons employed in the United Kingdom, stating sex, young persons, and children engaged in industrial occupations. The Department shall prepare a monthly statement indicating (1) the number of persons employed : (*a*) number of persons regularly employed ; (*b*) casually employed ; and (*c*) the number unemployed in any one week. A statement to be prepared monthly dealing with the average wages of persons permanently employed, irregular, and casually employed. A statement also to be prepared of the changes in wages and conditions of employment.

Administration of Factory Acts, etc.

Factory Acts, mines, docks, railway regulations, provisions for "dangerous," "unhealthy" occupations to be supervised by Minister, together with staff of inspectors occupied in the administration of any Act or regulation of labour under the Government.

Exchanges, Registration, etc., *re* Unemployment

Exchanges, registration agencies dealing with local or national unemployment to be administered by the Labour Minister.

Industrial Arbitration and Conciliation

A National Department of Industrial Arbitration and Conciliation to be under the control of the Minister.

Labour Legal Department

A Legal Department to be established dealing with trade union law and registration of trade unions, and all Acts affecting the industrial life of the workers.

Schemes dealing with Unemployment

National schemes dealing with unemployment: (*a*) unemployment insurance; (*b*) schemes dealing with afforestation, coast erosion, land reclamation, canal restorations, deepening, etc., military roads, or other forms of useful work to be included in the Labour Minister's administration.

Provision for Relief of Distress

Provision for relief, feeding, housing of unemployed and their families to be administered by the Labour Minister of State.

All powers, Acts, and authorities, dealing with labour interests and all machinery to be consolidated. Departments pertaining thereto to be in charge of the Minister appointed.

The establishment of a separate Ministry of Labour was part of the arrangement under which the Labour Party entered the Coalition Government formed by the Rt. Hon. David Lloyd George, M.P., in December, 1916, and the passing of the New Ministries and Secretaries Act in December, 1916, was one of the first acts of the new Government.

During the passage of the Bill through Parliament an amendment was moved for the purpose of authorizing the transfer to the proposed new Ministry of Labour of the powers and duties of the Home Office in regard to the Factory and Workshop Acts and Mines Regulation Acts. The Government resisted the amendment,

claiming that " it would be better not to transfer these duties at the moment," and eventually the new Ministry had allocated to it only those labour functions that had previously been assigned to the Board of Trade. It was indeed one of the arguments of the Government spokesman that the additional duties falling on the Board of Trade in consequence of the war had made that Department so unwieldy as to render advisable the detachment of some of its functions. The Act does, however, make possible the transference of the labour jurisdiction of other Departments to the Ministry, as will be seen from the following section :

2. There shall be transferred to the Minister of Labour the powers and duties of the Board of Trade under the enactments mentioned in the Schedule to this Act, and the Minister of Labour shall have such other powers and duties of the Board of Trade or of any other Government department or authority, relating to labour or industry, whether conferred by statute or otherwise, as His Majesty may by Order in Council transfer to him, or authorize him to exercise or perform concurrently with or in consultation with the Government department or authority concerned.

During the war there was a certain amount of overlapping and lack of co-ordination owing to the number of Government Departments having relations with labour. For example, the Ministry of Munitions and the War Office were concerned with the settlement of disputes on munitions work; the Admiralty as regards war vessels and other Admiralty contract work; the Board of Trade as regards the coal mining industry and the railways ; the Ministry of Shipping with merchant vessels ; the Air Ministry with the building of aeroplanes and the construction of aerodromes, etc. With the post-war reorganization of functions and the disappearance of certain of the Ministries created during the war, the Ministry of Labour has established its authority as the responsible Department for such labour matters as fall within its scope, and in other cases has adjusted its relations with the other Government Departments concerned in order to avoid overlapping.

Reference may be made to the Report of the Machinery of Government Committee which, under the chairmanship of Viscount Haldane of Cloan, O.M., K.T., reported in 1918. The Committee stated that the constitution of the Ministry of Labour (which it was suggested should be called the Ministry of Employment) is in harmony with the principle of concentration of the functions of government according to the nature of the services

rendered to the community. Some of the functions which the Committee proposed to assign to the Ministry of Employment would require to be slightly amended owing to later developments (*e.g.* the repeal of the Corn Production Act), but the Committee's proposals may perhaps usefully be recorded :

(i) The ascertainment and regulation of the conditions of employment, especially as regards wages, conciliation and arbitration, hours of labour, sanitation and safety, and special provisions relating to young persons and women.

(ii) The co-operation of the State with employers' associations and trade unions in their functions connected with the conditions of employment.

(iii) The administration of Unemployment Insurance, the Employment Exchanges and the Mercantile Marine Offices, so far as seamen's employment is concerned (the latter in concert with the Board of Trade).

(iv) The administration of the Trade Boards Acts, the Coal Mines (Minimum Wage) Act, and the minimum wage sections of the Corn Production Act, together with the supervision of the various Boards set up under these Acts.

(v) The administration of any provision made by the State, either directly or through local authorities, for the unemployed.

(vi) Such of the functions of the National Service Department as may be continued, so far as they relate to civil employment.

(vii) Advising the appropriate authorities as to the prevention of unemployment by the postponement or forestalling of works and contracts.

It was explained that, for the efficient discharge of some of the functions above mentioned, it would be necessary for the Ministry of Employment to maintain close and cordial relations with other Government Departments.

The Evolution of the Functions of the Ministry.—The first step in the establishment of the departmental organizations which constitute the present Ministry of Labour was the allocation to the Commercial Department of the Board of Trade of the function of collecting and publishing, in pursuance of a Resolution of the House of Commons of March 2, 1886, of statistics of wages, hours of labour, state of the labour market, conditions of the working classes, etc. Following the appointment of a Royal Commission on Labour in 1891 to consider " questions affecting the relations between employers and employed, the combination of employers and employed, and the conditions of labour, which have been raised during the recent trade disputes in the United Kingdom,"

the function of the collection and publication of labour statistics was in 1893 assigned to a newly formed Labour Department of the Board of Trade, which, however, formed part (until 1910) of a larger composite Department called the Commercial, Labour and Statistical Department.

The next step was the passing of the Conciliation Act, 1896, which imposed on the Board of Trade certain duties in connexion with the settlement of labour disputes. The administration of this Act was given to the Commercial, Labour and Statistical Department of the Board of Trade.

In 1909, by the passing of the Labour Exchanges Act of that year, the Board of Trade was given power to establish Labour Exchanges and to collect and furnish information as to employers requiring workpeople or workpeople seeking employment. A number of Labour Exchanges were accordingly established throughout the country. The administration of the Act was given to a separate branch of the Commercial, Labour and Statistical Department of the Board of Trade.

In 1909, also, there was passed the first Trade Boards Act, which empowered the Board of Trade to set up Trade Boards for the purpose of fixing statutorily enforceable minimum rates of wages in certain trades. A small Department of the Board of Trade was formed to carry out the necessary administrative work.

The growth of work on the labour side resulted in 1910 in the Labour Department being separated from the Commercial and Statistical Department of the Board of Trade. The Labour Department continued its existing functions of conciliation work, collection and publication of labour statistics, administration of Labour Exchanges and administration of the Trade Boards Act.

In 1911, the passing of the National Insurance Act brought into being in 1912 a scheme of Unemployment Insurance. Briefly, Part II of the Act provided for the payment of contributions by employers and workpeople in certain industries and for the payment of unemployment benefit, subject to certain conditions, to insured workpeople in those industries. The administration of the Unemployment Insurance scheme was entrusted to that branch of the Labour Department of the Board of Trade which controlled the Labour Exchanges. A result of the operation of the Act was a large increase in 1912 in the number of local offices, effected partly by the opening of fresh Exchanges and partly by the opening of a number of local agencies (offices manned by part-time officers).

During the same year (1911), as a result of the increasing volume of work of the Labour Department, a further administrative change was made by the formation of a separate Department (the Chief Industrial Commissioner's Department) to concentrate on the conciliation work. To this new Department was given the administration of the Coal Mines (Minimum Wage) Act, passed in 1912, which provided for the setting up of Joint District Boards in the coal mining areas to determine minimum rates of wages and District Rules, for workpeople employed underground in coal-mines.

In 1913, by a further administrative change, the Labour Department ceased to exist, two of its functions (the collection of labour statistics and the administration of the Labour Exchanges and Unemployment Insurance) being given respectively to two new Departments of the Board of Trade, viz. the Department of Labour Statistics and the Labour Exchanges and Unemployment Insurance Department. (The title of this latter Department was subsequently altered to the Employment Department of the Board of Trade, the Labour Exchanges at the same time becoming Employment Exchanges.) The administration of the Trade Boards Act was assigned to a separate small Department under the control of the Second Secretary of the Board of Trade.

The war added very considerably to the activities of the various Departments of the Board of Trade. Thus Part I of the Munitions of War Act, 1915, placed additional duties on the Board of Trade in connexion with the settlement of labour disputes arising in connexion with the manufacture of munitions of war. The administration of this work fell to the Chief Industrial Commissioner's Department.

On December 22, 1916, the Ministry of Labour was formally established by the passing of the New Ministries and Secretaries Act, 1916. Under this Act there were transferred to the new Minister of Labour the powers and duties of the Board of Trade under the Conciliation Act, 1896, the Labour Exchanges Act, 1909, the Trade Boards Act, 1909, the National Insurance (Unemployment) Acts, 1911 to 1916, and Part I of the Munitions of War Act, 1915. Accordingly, in January 1917, the Chief Industrial Commissioner's Department, the Employment Department and the Trade Boards Branch were transferred from the Board of Trade to the Ministry of Labour. In July, 1917, the same course was followed with the Department of Labour Statistics. At the same

time an Intelligence Section was created for the purpose of collecting and indexing industrial information.

Following the establishment of the new Ministry of Labour, a considerable number of additional duties were assigned to the Department. In 1917, a Joint Industrial Councils Branch of the Ministry was formed for the purpose of assisting in the development of Joint Industrial Councils on the lines of the "Whitley" Committee's Report of that year.

At the beginning of 1918, the National Insurance (Unemployment) Acts (which had already been amended in 1914, 1915 and 1916) were further amended, and in the summer of 1918 the Trade Boards Act, 1918, made important amendments to the earlier procedure.

Early in 1918, the Appointments Department of the Ministry was constituted by the amalgamation of the Officers' University and Technical Classes of the Ministry of Munitions and the Professional and Business Register of the Employment Department of the Ministry of Labour. The purpose of the Department was to deal with the resettlement in civil life of ex-officers of H.M. Forces, and also of ex-service men from the ranks of similar educational qualifications or professional and business attainments; it was also charged with the providing of employment for civilians of the professional and business type.

The coming of the Armistice was the occasion of a number of substantial alterations in the organization and duties of the Ministry. A special Department of Civil Demobilization and Resettlement was established, consisting partly of some of the existing Departments of the Ministry (Employment and Appointments) and partly of the Labour Supply and Labour Regulation Departments transferred from the Ministry of Munitions. The main function of this Department was to regulate the work of demobilization from the civil and industrial point of view, *e.g.* it dealt from this point of view with the order of priority of discharge of men from the forces. This included the settlement of men in the Dominions Overseas. This Department was also responsible for the checking of the flow of alien labour into the country under Section 16 of the Aliens Order.

A Wages and Arbitration Department was formed by the absorption of the Chief Industrial Commissioner's Department of the Ministry of Labour and part of the Labour Regulation Department of the Ministry of Munitions and undertook the administration

of the newly passed Wages (Temporary Regulation) Act, 1918, (which, broadly speaking, maintained for a period the standard rates of wages existing at the date of the Armistice). At the same time, Finance, Establishments and Legal Departments were set up for the Ministry.

Early in 1919, the Training Department and the Irish Department were formed ; the Military Service (Civil Liabilities) Department was taken over from the Local Government Board (now the Ministry of Health), and the Retail Business (Licensing Order) Branch was transferred from the Ministry of National Service.

In May 1919, the Wages (Temporary Regulation) Extension Act continued the operations of the Wages (Temporary Regulation) Act of 1918 to November 21, 1919. In August 1919, the Restoration of Pre-war Practices Act was passed, which provided for the restoration of trade practices departed from during the war in order to expedite the output of munitions ; and in November the Industrial Courts Act was passed, setting up the Industrial Court and providing for the appointment, where considered necessary, of special Courts of Inquiry. Both these Acts were administered by the Wages and Arbitration Department. In June 1919, the Civil Demobilization and Resettlement Department, as such, ceased to exist, but such of the work as remained was absorbed in various Departments of the Ministry.

During 1919, the Department of Labour Statistics and the Intelligence Division were brought together to form the Department of Intelligence and Statistics ; and the Trade Boards Division and Industrial Councils Division to form the Industries Department. The work of the Retail Business (Licensing Order) Branch terminated on December 31, 1919. In this year also the passage of a further National Insurance (Unemployment) Act had the effect of increasing the rates of benefit.

In August 1920, the Unemployment Insurance Act, 1920, was passed, which, generally speaking, extended Insurance against Unemployment to all persons over 16 to whom Health Insurance applied, unless employed in agriculture or private domestic service, thus increasing the number of persons insured against unemployment in Great Britain from about 4 millions to, roughly, 11½ millions. Details of this measure as well as of the further emergency measures passed during the succeeding years in connexion with Unemployment will be found in another section of this Memorandum.

In September 1920, as a result of the recommendations contained

in the first interim report of the Lytton Committee, the Joint Substitution Board—a joint body of the Treasury and Ministry of Labour—was set up for the purpose of seeing that the utmost use was made of the field of employment presented by the Government Departments themselves in the interests of ex-service men.

Early in 1920 it was decided, in view of the importance of the functions of the Ministry of Labour, that the Department should be graded as a first class Ministry and at the same time an additional (joint) Permanent Secretary was appointed. Subsequently, the functions of the two joint permanent Secretaries were divided as between a Chief Labour Adviser and a Permanent Secretary to a first class Ministry, and steps were taken to divide the various activities of the Ministry under eight main groups under the Permanent Secretary as follows :

Administrative Departments.

I. Industrial Relations Department.
- Conciliation and Arbitration. Relations with Industrial Court.
- Joint Industrial Councils.
- Administration of Fair Wages Clause, etc.
- (This Department embraces what was the Wages and Arbitration Department and the Joint Industrial Councils Division.)

II. Employment and Insurance Department.
- Administration of Unemployment Insurance Acts.
- Control of Employment Exchanges.
- Employment of Ex-service men.
- Juvenile Employment.
- Overseas Settlement.
- Aliens Order.

III. General Department.
- Administration of Trade Boards Acts.
- Statistics Department.
- International Labour Branch.

Common Service Departments.

IV. Finance.

V. Establishments.
- (With special responsibility for Departmental Whitley Council.)

VI. Solicitor's Department.

Temporary Departments.

VII. Training.

VIII. Appointments and Civil Liabilities Department.

There have since been further developments in the activities of the Ministry, particularly in connexion with the Unemployment side of the work. The granting of self-government to Ireland resulted in the severance of the Irish Branch of the Ministry and the establishment of separate Ministries to deal with labour matters in Northern Ireland and the Free State respectively. Substantially, however, the above reorganization represents the existing organization of the Ministry of Labour.

The Work of the Ministry.—The functions of the various Departments of the Ministry of Labour have been indicated above, but may now conveniently be described in rather more detail.

Industrial Relations Department.—The Industrial Relations Department primarily takes cognizance of all trade disputes and methods of avoiding or settling disputes. The legislation from which the Department derives its authority is comprised in the Conciliation Act, 1896, and the Industrial Courts Act, 1919. In addition, this Department is concerned more particularly with the setting up of Joint Industrial Councils in the various industries, and it deals with some other cognate matters such as a general supervision of the administration of the Fair Wage Clauses in Government contracts.

The staffing of the Department comprises a small Department at Headquarters, and conciliation officers in seven of the principal towns, with one sub-office.

The activities of the Department will best be appreciated after a consideration of the general machinery for conciliation and arbitration as a means of settlement of industrial disputes in Great Britain. There are two aspects, viz. :

(*a*) Voluntary Machinery.
(*b*) State Machinery.

The voluntary machinery comprises (1) Joint Industrial Councils, these being bodies set up in accordance with the recommendations of a Committee appointed in 1916 and presided over by the Rt. Hon. J. H. Whitley, M.P., now the Speaker of the House of Commons ; (2) permanent voluntary conciliation boards ; (3) recognized procedure arranged by organizations of employers and

workpeople—not having a formally constituted conciliation board, but providing for the discussion of differences as and when they arise.

Joint Industrial Councils have been established in 73 industries and services, but 17 of the Councils are at present not functioning and one has been absorbed by another Council. There are also 9 active Interim Industrial Reconstruction Committees in trades to which the Whitley Scheme cannot as yet be fully applied owing to lack of organization.

The Whitley Scheme contemplates, under the National Joint Industrial Councils, the establishment of District Councils and Works Committees, and such bodies have been set up in a number of cases.

A recent development has arisen under the Railways Act, 1921, which embodies an agreement between the companies and the railway unions for the establishment of Joint Industrial Councils on the railways. The scheme provides for the setting up of Committees at the large stations and depots, for not more than five Sectional Councils on each railway, and for Railway Councils to deal with subjects of common interest to two or more Sectional Councils. Considerable progress has been made, but the formation of the Railway Councils has been retarded by the necessity for awaiting developments in regard to the amalgamation of the various companies.

Owing to the abnormal economic conditions of the last few years the activities of Joint Industrial Councils have been directed largely to the settlement of wages claims and the adjustment of working hours. The Councils have, however, had before them all manner of questions of working conditions, *e.g.* overtime payments, payments for holidays, walking time allowances, out-working and subsistence allowances, fines for late arrivals. They have also shown much interest in the problem of Unemployment, a number having considered schemes for supplementing, or contracting out of, the scheme of State Insurance; certain Councils have made valuable statistical investigations and research into their particular industries; most Councils have considered questions of welfare in conjunction with the Home Office; and commercial problems in various aspects have also been before them. In this connexion, it may be observed that the Government agreed to regard the Joint Industrial Councils as the Standing Consultative Committees for the industries in which they were established, and in a number

of instances these matters have been discussed on the initiative of the Government. A few Joint Industrial Councils do not deal with wages questions; machinery for the settlement of wages already existed in these trades before the Councils were established, and it was thought by the industry expedient to continue such machinery.

Certain trades where organization is well developed, such as iron and steel, coal, cotton, engineering and shipbuilding, have not favoured the formation of a Joint Industrial Council. In these trades, conciliation boards, or other recognized and well-defined procedure for the settlement of disputes, are in existence.

The Industrial Relations Department maintains a liaison with the Joint Industrial Councils, with a view to assisting the Councils in their work.

Permanent Voluntary Conciliation Boards are an older form of joint body than the "Whitley" Councils; their growth represents a unique feature of the industrial development of the United Kingdom. Such boards have existed for very many years. Like Joint Industrial Councils, these Boards are equally representative of employers and workpeople, and their basis is entirely voluntary; they are unsupported by legal enactment, and depend for their success on the good-will of the parties. The Conciliation Boards, however, tend to confine their activities to questions of wages and working conditions, while the functions of Joint Industrial Councils embrace all matters appertaining to the industry.

The value of Conciliation Boards (as of Joint Industrial Councils) depends on their ability to prevent stoppages of work rather than on their power to settle strikes or lock-outs which may have already taken place. The membership of a Board being equally representative of the employers' associations and of the trade unions party to the agreement establishing the Board, it not infrequently happens that the two sides of the Board are equally divided on the question brought before them, and the efficacy of a Board as an instrument for composing differences depends in a measure upon the steps adopted for escaping from such a deadlock. In this connexion, it may be observed that the rules of certain Conciliation Boards contain a clause providing that, in the event of failure of the parties to effect a settlement of a dispute, application shall be made to the Ministry of Labour for the appointment of an umpire, arbitrator or conciliator.

To illustrate the working of Conciliation Boards, it may be

explained that for many years the boot and shoe industry has been covered by a series of Local Conciliation Boards existing in all the centres of the industry, questions affecting the industry as a whole being dealt with at National Joint Conferences presided over by an independent chairman. According to the rules of the Local Conciliation Boards, the procedure in a case of dispute between an employer and his workmen is as follows :

(*a*) The workmen first bring the matter before the employer or foreman. Should they not be able to agree, the representatives of the employers' association and the representatives of the workmen's union endeavour to settle the matter in dispute.

(*b*) If these representatives are unable to arrange terms, the matter is at once referred to a Standing Committee of Inquiry appointed by the Board—usually consisting of two representatives of the employers and two of the workpeople.

(*c*) In the event of the Committee of Inquiry being unable to settle the dispute, it is referred to the Board, and, failing a decision by the Board, to an umpire, or, in some cases, to two arbitrators (one from each side of the Board) appointed annually. Failing settlement by the two arbitrators, the dispute is referred to an umpire appointed by them or by the Ministry of Labour.

This particular conciliation scheme is accompanied by a system of financial guarantees.

In addition to the standing Conciliation Boards, there are a number of arrangements which, although not coming within the definition of a Conciliation Board, provide *regular procedure for the consideration and settlement of differences.*

An example may be given to illustrate the procedure. The highly organized cotton industry has not adopted conciliation board procedure, but the "Brooklands" Agreement signed in 1893 at the termination of the great dispute, for many years provided machinery for settlement of disputes in the spinning branch of the industry. This agreement has been superseded by new provisions agreed upon between the Federation of Master Cotton Spinners' Associations, Ltd., and the Amalgamated Associations of Cotton Spinners and Card and Blowing Room Operatives, whereby notices to cease work shall not be tendered until the matter in dispute has been considered by the Joint Committees of the two organizations, both local and central. In the weaving section of the trade two agreements are in force between the Cotton Spinners' and Manufacturers' Association and (*a*) the Northern

Counties Textile Trades' Federation, (*b*) the Amalgamated Weavers' Association; these agreements cover workpeople in the weaving departments of factories in north and north-east Lancashire, and provide that, before notices are tendered in a dispute, the question shall be referred to a local joint conference and, if necessary, to central joint conferences of the parties concerned. An important feature is a provision that, in cases of stoppages of work, meetings of the representatives of the signatories shall be held at intervals of four weeks in Manchester until the dispute has been settled.

Voluntary machinery of this nature (*i.e.* Joint Industrial Councils, permanent voluntary Conciliation Boards and recognized procedure for discussion) covers the principal trades of Great Britain.

Supplementary to this voluntary machinery (which is responsible for the settlement of the bulk of the differences that arise) there is the state machinery—on the one hand the Industrial Courts Act, 1919 (which, for practical purposes, embodies the Conciliation Act, 1896), and on the other hand the Trade Boards Acts for poorly organized trades.

The *Industrial Courts Act* defines the powers of intervention in industrial disputes exercised by the Government, through the Industrial Relations Department. In addition to continuing the Minister's authority to conciliate in suitable cases, the Act:

(*a*) Sets up a permanent Court of Arbitration (termed the Industrial Court), to which recourse can be had by parties to industrial disputes if both parties to the dispute consent.

(*b*) Empowers the Minister of Labour, in cases of disputes, whether apprehended or existing, to appoint a Court of Inquiry.

The establishment of a Standing Arbitration Tribunal was one of the recommendations of the Committee on Relations between Employers and Employed better known as the Whitley Committee —referred to above.

Should the parties desire, a dispute can be referred under the Industrial Courts Act either to a single arbitrator appointed by the Minister of Labour or to a special Board of Arbitration composed of members selected from panels of persons nominated by the Minister, but reference to the Industrial Court is the normal method adopted.

While permanent provision for voluntary arbitration is made by the establishment of the Industrial Court, it is the declared

policy of the Government that trade disputes should be settled as far as possible by negotiations between employers' associations and trade unions. A dispute may be referred for settlement under the Industrial Courts Act only after the exhaustion of available means for conciliation already existing in the trade.

The appointment of Courts of Inquiry was a further recommendation of the Whitley Committee, who said :

> Whilst we are opposed to any system of compulsory arbitration, we are in favour of an extension of voluntary machinery for the adjustment of disputes. Where the parties are unable to adjust their differences, we think that there should be means by which an independent inquiry may be made into the facts and circumstances of a dispute, and an authoritative pronouncement made thereon, though we do not think that there should be any compulsory power of delaying strikes and lock-outs.

The Minister is provided with power under the Industrial Courts Act to establish a Court of Inquiry for this purpose, and he may exercise this power whether the dispute exists or is merely apprehended ; moreover, the consent of the parties to this course is not required. These Courts have no power to settle the dispute by arbitration, but are limited to making a Report on the case, with possibly a recommendation as to the best course to be pursued. It is reasonable, however, to suppose that an informal and impartial public examination of the facts and circumstances is valuable in assisting to compose industrial disputes.

Broadly speaking there are two possible lines of Government policy on the settlement of labour disputes :

(1) To place the prime responsibility for the harmonious working of industry upon the employers and employed in each industry, leaving a Government Department, such as the Ministry of Labour, with statutory powers to intervene at discretion, and according to circumstances as viewed in the light of experience, such intervention to be generally directed towards the proper use by industries of responsible self-government.

(2) To attempt to impose statutory restrictions upon the ordinary economic rights of employers and employed by such measures as compulsory arbitration.

The existing policy of the Ministry of Labour, in accordance with the instructions of the Government, follows the first alternative.

GENERAL DEPARTMENT.—The General Department of the Ministry is, as already indicated, divided into three branches :

(*a*) Trade Boards Division.
(*b*) Statistics Division.
(*c*) International Labour Branch.

(*a*) *Trade Boards Division.*—The functions of this Division are the setting up of Trade Boards, the administration of the Trade Boards Acts, 1909 and 1918, including the confirmation of rates of wages and enforcement, and the consideration of general questions on minimum wages policy.

The voluntary machinery to which reference has already been made can function successfully only in those trades where both employers and workpeople are sufficiently well organized to secure the observance of agreements for the proper regulation of conditions. State action has been found necessary to enable certain of the less well organized trades, which had no adequate machinery to maintain reasonable rates of wages, to fix minimum wages and to secure effective observance ; this has been done by means of Trade Boards.

The Trade Boards Act of 1909 was passed with the avowed object of eradicating the evils of " sweating." Only four trades were scheduled by the Act, but power was given to the responsible Department (then the Board of Trade) to bring additional trades under the Act from time to time by Provisional Order. In 1918 an amending Act was passed substituting procedure by Special Order for procedure by Provisional Order and modifying the description of the trades which could be brought under the Acts.

A duty is imposed on the Minister of Labour of applying the Trade Boards Acts to trades to which the Acts do not already apply, if he considers that there is no effective machinery for the regulation of wages throughout a trade and that, in view of the rates of wages prevailing in it, a Trade Board is desirable. For this purpose, an investigation into the conditions in the industry is first made, and, if there is a prima facie case for the application of the Acts, the Minister gives notice of his intention to make a Special Order under the Acts. A period of at least forty days must be allowed in which objections may be sent to the Minister and, if such objections are received in the time allowed, the Minister must order a public inquiry to be held by some person not in

Government employment, unless he decides to amend or withdraw the Order or unless the objections are merely frivolous. On receiving the report of the inquiry, the Minister then decides whether he should make an Order with a view to establishing the Trade Board or not.

A Trade Board consists of an equal number of representatives of employers and of workpeople in the trade, to whom are added a neutral chairman and two or four persons unconnected with the trade, and known as "appointed members." Where there is any organization among the workpeople or employers, the trade unions and employers' associations are asked to submit nominations for the Minister's consideration. Where there is no effective organization, the only practicable method is for the Minister to nominate members selected to represent the various types of work done in the trade and the various districts where it is carried on. The number of members varies according to the needs of the trade. Women are eligible for membership of Trade Boards as well as men, and, where women are largely employed in the trade, at least one of the "appointed members" must be a woman.

As a rule, one Trade Board is established for Great Britain. In some cases, it is necessary to establish a separate Trade Board for Scotland; this course has, for example, been followed in the distributive trades.

A Trade Board may establish District Committees, and when a Board decides to establish such committees the representatives of local employers and local workers on the committee are selected by the Minister in the same way as the members of the Trade Board itself. There is at least one "appointed member" on each Committee.

With regard to the powers and duties of Trade Boards, a Trade Board must fix a minimum rate or rates of wages for time-work. Where no other rate has been fixed, piece-workers must be paid at rates sufficient to yield to an ordinary worker at least as much money as the minimum time rate. A Board also has power to fix certain other minimum rates.

In the case of all the various kinds of rates, the Board can fix different rates for different classes of workers or for different districts. In particular it can fix special rates for learners, and lay down conditions which will ensure that they are taught the trade properly. Rates may be fixed to operate for a certain time only or to increase or diminish on the expiration of specified periods. It will be seen,

therefore, that a Board can, if it thinks fit, fix minimum rates of wages for all classes of workers in its trade but it may, if it chooses, only fix a general minimum time-rate (which would serve also as a basis rate for piece-workers—see above) and leave other rates to be settled between the employers and workpeople themselves.

When a Trade Board proposes to fix or alter a rate it has to send notice of its intention to every employer in the trade whose name and address are known, and posters setting out the proposed new rate have to be exhibited in his works, so that the workpeople may see them. Two months are allowed in which either employers or workpeople may object to the proposal. If, after considering any objections received, the Board decides to fix the new rate, it informs the Minister of Labour accordingly, and within one month he has to make an order confirming the rate and stating the day on which it is to come into force (unless for some special reason he thinks that the Board should reconsider its decision). Thus a new rate can come into operation in about three months after the Board's first decision.

When a rate has been fixed, every employer in the trade must exhibit the Trade Board's Notice, giving full particulars of the rate in his factory or workshop or in the place where work is given out to outworkers. Any employer who pays wages at less than a minimum rate to any worker to whom it applies, is liable to a fine of £20 for each offence, and to a further fine of £5 for each day after his conviction on which he fails to pay the legal rate. The Court may also order him to pay the arrears of wages due to the worker. The Ministry of Labour has special officers whose duty it is to ensure that the legal rates are paid. Any worker who thinks he is not receiving the rate due to him may complain to the Minister of Labour or to the Trade Board; but where an offence has been committed, legal proceedings may be taken, whether a complaint has been received or not.

The Trade Boards Acts make special provision for dealing with "waiting time," learners' premiums, deductions, and infirm and injured workers in trades for which a Trade Board has been established.

It may further be added that Trade Boards are given power to make representations to any Government Department on matters relating to the industrial conditions in the trade, and the Department is bound to give consideration to their views.

The number of Trade Boards at present in existence is :

For Great Britain . . .	34
For England and Wales . .	5
For Scotland	5

A number of Boards have also been set up in Northern and Southern Ireland.

The Acts have now been applied to trades covering approximately 2½ million workpeople.

The Trade Boards are independent bodies, though they are financed and staffed by the Ministry of Labour, and though their rates are subject, as described above, to confirmation by the Minister.

In September 1921, a Committee of Inquiry, under the chairmanship of Lord Cave, was appointed to inquire into the working and effects of the Trade Boards Acts. This Committee issued its Report in April 1922 (Cmd. 1645).

(*b*) *Statistics Division.*—The functions of the Statistical Division are the collection, classification and recording of statistical and other information relating to labour matters at home and abroad, including wages, hours of labour and other conditions of employment, cost of living, the state of employment, strikes and lock-outs, organizations of employers and workpeople and other subjects. The information is made available for the whole of the Ministry, for other Government Departments and for the general public by the issue of a monthly journal (*Ministry of Labour Gazette*) and of reports and memoranda and by answers to inquiries.

The work was originally undertaken by the Labour Department of the Board of Trade, in pursuance of a resolution adopted by the House of Commons in 1886 to the effect that " in the opinion of this House immediate steps should be taken to ensure in this country the full and accurate collection and publication of labour statistics."

(*c*) *International Labour Division.*—The I.L. Division maintains a liaison between H.M. Government and the International Labour Organization created by Part XIII of the Treaty of Versailles, and is responsible, in consultation with the various departments of the Ministry, for all departmental work created by the activities of this Organization. It is also responsible (in association with Solicitor's Department) for watching the progress of labour cases referred to the Permanent Court of International Justice for decision. It undertakes, in addition, the secretarial work of the I.L. Committee, a standing inter-departmental Committee estab-

lished by a decision of the Cabinet assigning to the Ministry of Labour the general responsibility for all British Government business connected with the I.L. Organization. The Departments represented on the Committee, in addition to the Ministry of Labour, are the Home Office, the Board of Trade, Treasury, Foreign Office, Colonial Office and the Scottish Office. Other Departments, such as the Ministries of Agriculture and Fisheries, Health and Transport, send representatives to the Committee from time to time for the consideration of matters falling specially within their competence.

[*To be concluded.*]

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Irish Free State Constitution Act, 1922.—If it is desirable that a Constitution should as far as possible be intelligible on the face of it, it must be admitted that this requisite is signally ignored in the Act [1] which adopts the Constitution of the Irish Free State as passed by the Constituent Assembly of that territory. The fault, of course, lies primarily with the Assembly, since it adopted the difficult procedure of enacting a Constitution subject to the principle that its terms were to be overruled by the Treaty between Great Britain and Ireland of December 6, 1921, and the time available for the enactment of the measure by the Imperial Parliament was inadequate to permit of any effort to remove ambiguities, even if political considerations had rendered such a course expedient. The result, however, is that on vital points the Courts will be left to decide how far the actual terms of the Constitution conform to the provisions of Art. 2 of the treaty which lays down the rule that, in the absence of provision to the contrary, "the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." In many, and unfortunately these vital, points the Constitution as passed does not conform to the Canadian model, and judges will be placed in a most unenviable position by the terms of the Act, which, to avoid absurdities, they will have to interpret in a generous sense. An obvious example is furnished by the power of altering the Constitution in essentials; that is freely taken in the Constitution; yet it is a power denied to Canada, on the score that a federal compact cannot be changed lightly. If the Act is to be construed rigidly, the provisions as to constitutional change may be held invalid, which would be intolerable. It must, however, be noted that, if Northern Ireland is ever to enter the Free State, the question of constitutional alteration would require reconsideration. A further difficulty arises from the question of the supremacy of Imperial legislation over Irish legislation; the Constitution aims, of course, at excluding for

[1] 13 Geo. V. c. 1.

Ireland any but Irish legislation. Thus in Art. 12, altered apparently in accordance with a suggestion which I made on the appearance of the draft,[1] it is now provided that the "sole and exclusive" power of making laws for the Irish Free State is vested in the Legislature, and Art. 73 continues existing laws in force until repealed or amended by the same authority. But it is clear that Imperial legislation is still supreme in Canada, and these provisions of the Constitution are not effective to oust this supremacy. To take a concrete and conclusive example: the British Nationality and Status of Aliens Acts are still in force in Ireland, and cannot be altered by Irish legislation, in so far as they are enactments for the whole Empire; the Irish Legislature cannot deny a man born in Ireland the status of a natural born British subject, nor can it confer it upon him, save under the principles laid down in the Act. Again, the legislative power of the Free State as to British shipping must be restricted, as is that of Canada, by the Merchant Shipping Acts. Further, it is regrettable that the territorial extension of Irish legislative powers is still left in the hopeless confusion applicable to the Dominions. The subject is a difficult one, but the process of evading a solution is not capable of indefinite prolongation without serious inconvenience. The Irish Courts may be forgiven if they decide to ignore the restrictions laid down by the Judicial Committee of the Privy Council,

The Governor-General and the Chamber of Deputies.—A complex issue is raised regarding the compatibility with the Treaty of the attempt in the Constitution to make the Chamber of Deputies decide its own duration within the maximum period of four years. In the Constitution as finally passed it is provided by Art. 28 that the Chamber may not at any time be dissolved, except on the advice of the Executive Council. In Art. 53 it is laid down that the Legislature shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in the Chamber of Deputies. These articles must mean that a dissolution is impossible save on the advice of an Executive Council which commands a majority in the Chamber. This, of course, is wholly incompatible with both British and Dominion practice. In the former case the Crown would certainly not refuse a dissolution asked for by a defeated Ministry, and in the latter the Governor-General, though by constitutional practice he may refuse, still is always entitled to grant a dissolution, and often does so. The rule, therefore, must be regarded rather as a constitutional principle than as binding legally on a Governor-General, who indeed can hardly divest himself of the duty of exercising his discretion in the matter, since he is legally bound to follow Dominion practice. The unfortunate Governor-General will also be faced with the very difficult problem of deciding what is the constitutional usage regarding assent to Bills in Canada, since he is under a legal obligation to act on this principle. It can hardly be seriously contended that to leave such difficulties untouched was desirable, even if it proved inevitable.

[1] *The Times*, June 19, 1922.

Martial Law.—The civil war in Ireland explains a very important modification made in the original draft of the Constitution before enactment by the Constituent Assembly. Art. 6 provides that the liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Provision is made for the effective vindication of this principle by proceedings on *habeas corpus*, but in the final version of the article the following proviso is added: "Provided, however, that nothing in this article contained shall be invoked to prohibit, control or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or armed rebellion." This is in effect a statutory recognition of the common law rule which was enunciated, though unfortunately in obscure and difficult terms, by the Judicial Committee in *Ex parte D. F. Marais*.[1] The doctrine, it is important to note, as legislatively approved, goes no further than is essential to prevent interference with the effective operation of troops in war or in the suppression of armed rebellion. It does not assert what are the common law rights of these forces, nor does it in any way extend them. The principle is in effect in precise accord with the judgment of the Master of the Rolls in the application made to him on behalf of the ill-fated Erskine Childers on November 23, 1922. In his judgment the right of any Government *de jure* to organize a force to protect its subjects and maintain peace is asserted, and the claim for protection from a civil Court during a state of open rebellion, avowed by Captain Childers, is thus answered: "He has been tried and convicted by a tribunal which is not a Court of Justice, and apparently no sentence has yet been pronounced. He disputes the authority of the tribunal and comes[2] to this civil Court for protection. The answer of the Court must be that its jurisdiction has been ousted by the state of war which he himself has helped to produce. However doubtful the law might have been in the past, it is now clearly established that, once a state of war arises, the civil Courts have no jurisdiction over the acts of the military during the continuance of hostilities." He rejected also the objection that civil Courts were as a matter of fact functioning, and, therefore, it was not open to military tribunals to invade their sphere, on the ground that it was impossible to assert that the Supreme Court was freely functioning when it required the protection of military guards, when the Courts of the judges were interfered with, and when some of the County Court judges dared not enter their districts. It is interesting to note that by Art. 70 of the Constitution an effort is made to limit the exercise of jurisdiction over civilians by military tribunals. It is laid down that "the jurisdiction of military tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with

[1] [1902] A.C. 109. Cf. *Responsible Government in the Dominions*, i. 272 f.

[2] The application was made really for the sake of other prisoners rather than for E. Childers's personal benefit.

the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil Courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction." The qualification "all" does not appear in the original draft. It will be interesting to see how far it proves possible to provide satisfactorily for the exercise of jurisdiction by military tribunals in a manner compatible with the liberty of the subject.

Dominion Honours.—The report of the Commission on Honours in large measure dealt with a problem which has comparatively little importance in the Dominions, in which payment to political parties for honorary distinctions has never flourished, largely perhaps because it has never been in the power of Dominion ministers to give effective undertakings in these matters. The Commission, however, might never have come into existence but for the grave error made in submitting for an honour the name of a Dominion citizen without securing that the recommendation had the approval of the Dominion Prime Minister and the Governor-General. The deliberate ignoring of Dominion opinion in these matters is nothing new; it lay at the bottom of the protests from Canada and the determination that no further recommendations for honours should be made by Canada, coupled with the embarrassing request that hereditary honours already bestowed on Canadian residents should be made to cease to have effect on the death of their present holders. This might have been sufficient to prevent the repetition in 1922 of an error which had caused so grave a state of irritation in the Dominion, and it may be hoped that the very moderate recommendation of the Commission, that the Governor-General and Prime Minister should be consulted before any honour is conferred for imperial services on a Dominion resident, will be effectively carried out in future. The true principle is admirably expressed in Art. 5 of the Free State Constitution which enacts that "no title of honour in respect of any services rendered in or in relation to the Irish Free State may be conferred on any citizen of the Irish Free State except with the approval or upon the advice of the Executive Council of the State." This leaves it, of course, perfectly open to the Imperial Government to award honours in respect of services in connection with Ireland to persons not citizens of the Free State; but it enunciates the principle that if a man is sufficiently identified with a place to be a citizen of it, he should not obtain honorary distinctions without the assent of his own Government. The provision in the Constitution is obviously intelligible only on the acceptance of the unity of the Empire. It is characteristic of the republican attitude of mind that the suggestion should have been made in South Africa that a South African local order should be created to which appointments would be made by the Union Government at pleasure without reference to the Imperial Government.[1] As a logical corollary it is recog-

[1] See *The Times*, January 8, 1923.

nized that, if this principle were adopted, it would be open to the Imperial Government to make what grants of honours it thought best, irrespective of local wishes. This would be to treat the Union as a country foreign to the United Kingdom, and it is pointed out that at the end of the Kruger régime a Bill was actually presented to the Volksraad, though it never became law, providing for the establishment of an order of the South African Republic. That local orders would ever be popular may be doubted, but, if honours are to be Imperial in validity, then the Imperial Government must be ultimately responsible for them, while the right of the Dominions can best be recognized by requiring the approval of the Prime Minister for all such honours for Dominion citizens as may not be actually suggested by him. It must also be remembered that Dominion sentiment regarding honours varies from Dominion to Dominion and from time to time, and that opinion is steadily hardening against hereditary honours, which are out of place in normal Dominion society.

Bilingual Laws.—The addition of the Irish Free State to the number of British territories, where two languages are equally valid for official purposes, renders interesting a dictum of the Judicial Committee regarding the circumstances in which the provision of the Civil Code of Quebec, which deals with discrepancies of versions, is applicable. Art. 2015 of that Code contemplates that, when there is divergency between the French and English texts of an enactment, then that version shall prevail which is most consistent with the existing law. This provision is not, it is clearly laid down in *City of Montreal* v. *Watt and Scott, Ltd.*,[1] to be applied in any case where the texts are not clearly divergent. When one text offers the possibility of more than one sense, then the other text should be looked to, in order to determine whether it affords a clue to the sense really intended in the other, and, if this is the case, that interpretation is to be adopted. The operation of the article, therefore, is confined to those cases where logically it is essential, in which by some unfortunate error there is actual divergence of texts. As regards Irish laws, the difficulty is avoided by the provision of the Constitution under which the Governor-General will sign one of the two fair copies in Irish and English which are to be prepared of every law, and that version will prevail in case of dispute; but for regulations a definite rule will be essential.

The Constitution of the Bahamas.—The Speaker of the Bahamas House of Assembly has written and presented to that body a most interesting account of the vicissitudes of representative government in the Bahamas.[2] The history of the islands illustrates admirably that desire for self-government which ultimately led to the revolt of the American colonies on the mainland. As early as 1647, when settlement was begun, it was contemplated that in a few years' time there should be an elected

[1] [1922] 2 A.C. 555.

[2] *A History of the Bahamas House of Assembly*, by Mr. Speaker Malcolm. (Nassau, 1921.)

legislature, and, when Charles II granted a charter creating a Proprietory Government in 1670, the making of laws was to be carried out with the advice and consent of the freemen. The Letters Patent also granted to the Lords Proprietors or their magistrates the power of making Ordinances in view of the fact that an Assembly could not always be conveniently called. This provision was an attempt, ultimately recognized to be illegal, to preserve to the Executive some subsidiary legislative authority, and it is significant that the Letters Patent expressly forbade the affecting by Ordinance of the interest of any person in his freehold goods or chattels. It was realized even then that, if any effort were made to alter the rules of private law by Ordinance, the validity of such legislation would be called in question by private persons, while the Ordinances were likely to go unchallenged, if they were confined to dealing with more public matters. It is noteworthy that, when the Crown assumed directly the government the Letters Patent of February 5, 1718, expressly provided that the Governor, even with his Council, was not to enact laws until an Assembly should be called. As a matter of fact this step was postponed until 1729, and the Governor and Council had ere then to pass certain enactments of legislative character. These, however, seem to have been matters not affecting private rights as such, but rather general regulations to secure the necessary labour and material for the placing the settlement in a condition of defence, by requiring personal service and contributions from the residents with the option of a pecuniary payment in lieu. It must be remembered that these matters were plausibly to be regarded as part of the common law obligation of any subject to aid in military defence, and, therefore, the Orders of the Council can hardly be treated as legislation proper. In deciding on a Court of Claims to deal with land claims, the Council was careful to ask for confirmation by the Imperial Parliament. In effect the necessity of an Assembly for any true legislation appears to have been frankly accepted, and the present Legislature is the lineal descendant of that first called in 1729. Its record has been one of useful activity; in the Bahamas the emancipation of the slaves was carried out with much less friction than elsewhere, and the present franchise is low and democratic. Female suffrage is still withheld. Friction with the Imperial Government has been long minimal; the Speaker records Mr. Chamberlain's action in 1899–1900 in seeking to prevent the carrying out of certain expenditures which he deemed unwise, but mentions also his withdrawal of the intervention. Since then there has been little to disturb harmonious relations between the Legislature and the Imperial Government. There is, of course, abundant room for friction between any legislative body with sole control of the purse and an Executive which it does not appoint; but, as the Speaker says, it is a "striking testimony to the ability and common sense of the inhabitants of these islands that, although their political constitution is perhaps unworkable in theory, they nevertheless have succeeded in working it with much satisfaction for a period of nearly two centuries."

It is of special interest to learn how in details the procedure of the House of Commons is varied or followed in the Assembly. The silver mace, which figures in its proceedings, has a respectable history, if not the romance of being the mace of the Province of South Carolina, as was once fondly believed; it was made in London in 1799, and probably taken to the colony by Mr. Speaker Wylly in 1800.

Jurisdiction in Respect of Sovereign States under British Protection.—Interesting but not unexpected light has been thrown on the position of those States which are under British protection by the affirmation by the Court of Appeal [1] of the judgment in the Court below [2] in the case of *The Duff Development Company, Ltd.* v. *The Government of Kelantan and the Crown Agents for the Colonies.* The essential facts of the matter may be put very briefly: an arbitration took place between the Government of Kelantan and the Duff Development Company; the result of the arbitration was unsatisfactory to the Government, and it applied to Mr. Justice Russell for an order to set aside the award. This was refused, and an appeal from the decision to the Court of Appeal was unsuccessful. The costs, as taxed and payable by the Government, amounted to £5,637, and in order to secure payment the company obtained on July 15, 1922, a garnishee order *nisi* attaching all debts due from the Crown Agents for the Colonies to the Government of Kelantan, thereafter proceeding to ask for an order for payment by the garnishees of a sum of £1,725 which the company itself had recently paid to the Crown Agents, under an agreement for a loan by the Kelantan Government, on which interest was due from the company. Whether as a matter of law the sum in question really was due by the Crown Agents to the Government was dubious, for Mr. Justice Russell's dismissal of the contention, that it was really the property of the Federated Malay States, was questioned by the Master of the Rolls on grounds of obvious validity, but the case was decided without regard to this issue. The effective defence was that, in the first place, Kelantan was a sovereign State, and, secondly, that the property of such a State could not be taken in any way in execution. On the first issue the Court held that the certificate of the Secretary of State for the Colonies was absolutely binding on the Court, and that it was not open to question it in any way. The decision is not merely covered by binding authority,[3] but is obviously necessary; a Court which set out to decide by itself such an issue would be handicapped by the impossibility of obtaining any effective evidence which it could set against a statement by the Secretary of State. In the second place, it was held that no form of proceedings to enforce execution was possible, despite the fact that the Government of Kelantan had submitted to the jurisdiction and indeed invoked the aid of the British Courts. Submission to the jurisdiction gives the Court complete authority to make

[1] See *The Times*, January 17, 1923. [2] 39 T.L.R. 36.

[3] *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149, and other cases in Dicey and Keith, *Conflict of Laws*, pp 215, 216.

such orders as are necessary to enable it to come to a proper conclusion on the matter before it, but it goes no further. It does not empower the Court to authorize enforcement of its decision by any form of execution. Though this precise point has never actually before been settled, it was clearly recognized by the Court of Appeal in *The Newbattle*,[1] in which the fact that execution would not be possible against a ship owned by the Belgian Crown was made a good ground for demanding security for costs from the plaintiff's sovereign. Analogous also is the decision in *Suarez* v. *Suarez*,[2] which decides in effect that execution is not possible against the effects of an Ambassador, even when a judgment has by reason of his submission to the jurisdiction been duly rendered against him. The case of *The Newbattle* suggests that a matter of prudence security for costs should be demanded in the case of foreign sovereigns as plaintiffs.

From an imperial point of view the case is interesting as reaffirming the fact that, although the foreign policy of the Malay States is entirely in British hands, and although in varying measure their administration is conducted under British guidance, yet they remain genuine independent States for purposes of private international law. The anomalies of the general exemption—which lately have become glaring in the case of Governments employing trading fleets—are manifestly increased when a Government, which, technically foreign and sovereign, is under effective British control, is enabled on this technicality to escape the legitimate results of its own application to the British Courts to set aside an arbitration award under an agreement into which it deliberately entered. It is impossible not to agree with the Master of the Rolls that the dignity of a sovereign State is far more effectively asserted by honesty in paying costs awarded against it in proceedings which it initiated than by insistence on an immunity granted for reasons of state at a time when a Government engaged in commercial transactions was practically left out of consideration.

[1] 10 P.D. 33.

[2] [1918] 1 Ch. 176; Dicey and Keith, *op. cit.*, p. 220, note *f*.

NOTES

The late Sir John Rankine, K.C., LL.D.—Sir James Balfour Paul, LL.D., Lyon King-of-Arms, has contributed to *The Juridical Review* of December 1922, an appreciation of the late Sir John Rankine, K.C., LL.D., who was an old and valued member of the Society, which we reprint almost *in extenso:*

"Not only to the legal profession but to the community at large is the death of Sir John Rankine, which took place at his residence at Threepwood on 8th August last, a great loss. . . . John Rankine was a son of the manse, like so many other eminent Scottish lawyers. His father, who came of a good Ayrshire family, was minister of the parish of Sorn, a living which he held for forty-four years. John was born on 18th February, 1846, the eldest of a large family. He was brought up in an atmosphere of plain living and high thinking; and the influence of habits of steady application to work, combined with a wide outlook on life, were manifest in his after-career. It was the writer's privilege to meet him as a little boy in his father's manse, and even then his tenacity of purpose and earnestness in action were revealed in his games. After a short period at the parish school he went with his next younger brother to the Edinburgh Academy, and after graduating at the University and attending the law classes there, went to Heidelberg to complete his education. Coming home, he was called to the Bar in 1869, and from then his allegiance to that science who has 'her seat in the bosom of God and her voice in the harmony of the world' was complete and unswerving. Not that he was in the least suited for the rôle of the popular counsel; his was not the faculty of glib repartee or of specious and showy argument. The consequence was that he had never a great forensic practice, but as a chamber counsel his opinion was much sought after and valued. It is on his many works as an institutional writer that his legal reputation will mainly rest. Abler pens than mine must, however, deal with his legal attainments and career; it need only be mentioned here that, from the appearance of the first edition of his *Law of Land-ownership in Scotland*, he was recognized as a worthy successor of the really great writers of former days. He had found his *métier*, and from that day to the end of his life it was seldom that one entered his study without finding him engaged in the correction of proofs either of later editions of the work just named or of his more popular (because more indispensable) edition of 'Erskine.' Even in the last

year of his life he produced a new work on *The Law of Personal Bar in Scotland*, which was received with approval by those who know anything about this somewhat recondite subject.

"Promotion at the Bar often—perhaps too often—depends on the political proclivities of the aspirant. But, though a consistent Conservative, Rankine took no prominent part in politics. He was an Advocate-Depute under Lord Advocate Robertson during the latter's comparatively short tenure of office in 1885. But when Mr. Norman Macpherson, more famous for the geniality of his character than for his powers of exposition, resigned the Chair of Scots Law in the University of Edinburgh in 1886, it was unanimously felt that Rankine was the man to succeed him, and he fully justified the choice. For more than five-and-thirty years he expounded the law from his professorial chair in a manner which won for him not only the high esteem but the warm affection of his students. His heart was in his work, and to his faculty of lucid exposition he united the power of making a somewhat dry subject interesting. He kept his class abreast of the latest developments of his subject, and of the many legal practitioners who passed through his hands there is not one who does not look back on the period in which he attended his class with a lively appreciation of the benefit he derived from his learned teacher. He delivered his last lecture at the close of the summer session, and he felt the parting from his academic career very keenly. It was hoped he had entered on a long and happy period of rest and recreation, but *dis aliter visum*, and perhaps it was better so.

"It is not so much, however, as a lawyer or professor that I would consider John Rankine. I think of him more as a man, and a close personal friend. No human being was more worthy of friendship; he developed life in a somewhat different way from other people. He was in no sense a 'society' man, but he was by no means the mere pedantic recluse. True, he played no games; his chief recreation was shooting, of which he was a very fair exponent, though somewhat handicapped with short sight. Many are the days of sport he enjoyed with his great friend Lord Watson, whose devotion to the gun was one of his distinguishing features. For many years, too, he was the annual guest of another old legal friend at one of the best moors in Perthshire. It is not so well known that at one time of his life he knew pretty well the public form of all the best-known racehorses, though this was purely academic knowledge, as I do not suppose he ever made a bet or hardly ever saw a race during his whole life. It was only an instance of the wide extent of his knowledge; few men had a better acquaintance, not only with the current literature of the day, but of all periods, and there were not many subjects on which he did not display an intimacy which was surprising.

"I have said he played no games; but his muscular activity developed itself in walking, and many was the pedestrian feat he accomplished. His well-knit frame seemed incapable of fatigue, and he has been known,

after a long day's tramp with a gun through turnips, to turn to his work in the evening, after all his guests had sought their couch, and labour till the small hours of the morning. It is worth relating, in connexion with this, that on his seventy-second birthday he walked alone from Edinburgh to Threepwood, a distance of thirty miles, without once sitting down. While the prudence of such a feat at his age may be questioned, it was a wonderful performance.

"It was perhaps as a guest and a host that Rankine was at his best, and memories will ever abide of sunny days and pleasant evenings spent with him in many places, all associated with the aroma of his enormous 'Trichy' cheroots, from which he was inseparable. He was a great traveller, and had visited most countries in the world. He went to India in 1884 as a member of the Church of Scotland's Foreign Mission Committee in connexion with the *Hastie* case, and again under the auspices of the same Committee he went in 1902 to South Africa with his brother-in-law, Dr. Scott, of St. George's, Edinburgh. He was by birth and upbringing a staunch member of the Church, though he never saw his way to become an elder.

"Not the least useful sphere of his many activities was the interest he took in certain kinds of public work, but it was not work which brought him before the eyes of the public. He was a most helpful member of the University Court, and was much consulted by his friend Sir William Turner. He was for many years a Governor of the Royal Infirmary, the Royal Veterinary College, the Students' Union, Donaldson's Hospital, and the Edinburgh Royal Asylum, the Managing Body of which presented him a few years ago with his portrait painted by Mr. David Alison, R.S.A. He was also a Director of the Commercial Bank, and took a great interest in its concerns.

"He did not seek honours, but he was gratified when the University of Glasgow made him LL.D., and few knighthoods have been more unobtrusively though most deservedly earned than that conferred on him in 1921.

"Of ample private means, he lived simply and avoided all forms of ostentation. . . . This is not the place to speak of his public or private benefactions; they were many, though they were not always advertised in 'subscription lists.'

"His was a peaceful and happy life, though in late years it was clouded by much domestic sorrow.

"I have said how modest the Professor was, and I am sure he would have deprecated any formal eulogium being pronounced on him. But such a man can hardly be allowed to pass away without some tribute, however inadequate, being paid to his memory."

The South African Senate and the Speaker's Conference.—The Senate of the South African Union contains forty members—a number which was chosen in order that the members of the Senate should be one-third of that of the House of the Assembly. These forty members

were selected by combining the two principles of nomination and election, a blend to be found in no other second Chamber in the Dominions.

1. *Nomination.*—Eight of the members are nominated by the Governor-General in Council. Four of this group are selected because of their "thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa." It was expected that the other four would be members of legal experience who would be especially qualified for the technical revision of Bills coming up from the Lower House.

2. *Indirect Election.*—Long and heated discussions took place in the South African National Convention of 1900 on the method of selecting the remaining thirty-two Senators.

The first question that arose was whether the Senate should be based strictly upon population, or whether the four Provinces were to have equal representation. The delegates from Cape Colony felt that they were acting more generously than the electors of the Cape would approve in agreeing to put its representation in the Senate on a par with that of the two smaller Colonies. On the other hand, the smaller Colonies feared complete absorption, and without the safeguard of equality of representatives in the Senate, Natal and the Orange River Colony, might have refused to enter the Union. Cape Colony finally accepted these arguments, in view of the fact that the arrangement was to be made a provisional one for ten years, and could then be altered. Each Province has, therefore, eight members in the Senate, and their selection was the last important act of the expiring Parliaments of the four Colonies. The two Houses of each Legislature met and jointly elected the eight Senators for the Province. These Senators held office for ten years, and any casual vacancy among them, due to death or other causes, was filled by election by the Provincial Council of the Province.

When the ten years elapsed, on October 31, 1920, the second method of constituting the Senate came into operation.

Under this method, while the position of the nominated members and all the other provisions relating to the Senate were left unaltered, an important change was introduced in the method of electing the eight members from each Province.

They are now elected for each Province by (*a*) the members of the Provincial Council, (*b*) the Members of the House of Assembly elected from the Province.

The South African Senate thus represents a combination of three principles:

(*a*) Nomination.

(*b*) Election by local authorities.

(*c*) Election of the Upper House by Members of Parliament. Here South Africa has adopted an idea the rapid growth of which in recent years is the chief modern development in the constitution of Second Chambers.

The hope that the Senate would consist of men of substance and of mature age, who would view public events in a detached spirit, was expressed in the provisions that Senators must be thirty years of age, and the owners of immoveable property within the Union, worth not less than £500 clear of mortgages.

Simple provisions, carried through the Senate without difficulty, define the powers of the Senate.

If the Senate rejects a Bill which has come to it from the House of Assembly, or introduces amendments to which the Lower House will not agree, the Bill is delayed for one session.

If, after this interval, the House of Assembly again carries the Bill, and the Senate again refuses to pass it, the Governor-General may convene a Joint Session of the two Houses at which the House of Assembly, with its hundred and thirty-four members, has the preponderant power over the Senate, with forty members.

The usual provisions are laid down by which the Senate may not originate or amend money Bills. If it rejects them, the Joint Session takes place immediately without the delay of a session. Beyond these provisions, the Governor-General has a reserve power of dissolving both the Senate and the House of Assembly simultaneously. This power has not been utilized, and, in view of the other means provided for solving a deadlock, is unlikely to be needed.

The provision for the solution of deadlocks is the most interesting feature of the South African Senate, and marks it off sharply from all other Second Chambers in the Dominions. Instead of the Senate being able to destroy Bills coming from the Lower House, it can merely delay such Bills long enough to make it well worth the while for that House to listen to its suggestions ; but if the Lower House is determined, the Senate will probably be over-ridden.

During the session of 1920, the Prime Minister announced his intention of setting up a Speaker's Conference, consisting of members of all parties drawn from the two Houses of Parliament on the model of the Bryce Conference which had been held in England.

The idea was accepted by all parties, and the formal announcement of the Conference was made by the Prime Minister in August 1920. It is important to notice that the terms of reference of the Conference dealt only with the Constitution of the Senate, and not with its powers.

The first question raised at the Conference was whether the Union needed a Second Chamber of any kind. Many members in the National Convention had regarded a Second Chamber as a costly institution which would be of no service to the State, and might be an intolerable nuisance. The Labour Party tended to a preference for a single chamber system, but the Speaker's Conference decided against this by a large majority. The restricted powers granted to the Senate make it a Second Chamber with such limited authority that

it would not seem worthy of the name to advocates of a more potent Upper House.

1. *Nomination.*—The Speaker's Conference recommended the abolition of nomination for general purposes, and its use only for the special object of representing native interests. Even for this limited object, some members wished to circumscribe the Government's freedom by requiring recommendations from such bodies as the Native Affairs Commission; but this suggestion was not insisted upon.

2. *Direct Election.*—The next most important question that arose was the method of electing the thirty-two Senators who had hitherto represented the Provinces. Many members wished to abandon the principle of equal representation of each Province, and to divide the Union into equal areas, irrespective of provincial boundaries; but the Conference finally decided to retain the system of selecting eight Senators for each Province. On the vital question of the selection of these Senators the Conference recommended direct election by means of Proportional Representation, each Province to be a single constituency,

3. *Election by Members of Parliament.*—The principle of election of Members of Parliament contained in the existing Constitution of the Senate was retained by the Speaker's Conference, which proposed that the small group of remaining members should be elected by the House of Assembly and the Senate sitting together. (*Note.*—It was proposed that the members of the Senate should be one-third those of the House of Assembly, which at present contains 134 members. The Senate, therefore, would contain forty-four members, of whom, after deducting the eight nominated and the thirty-two elected members, eight would be left for election by members of Parliament.)

The Conference recommended that the period of the life of the Senate should be reduced to seven years, and that the property qualification of its members should be discontinued.

Some general conclusions may be drawn from the Speaker's Conference:

(i) An elected Second Chamber is likely to demand greater power over money Bills than one which stands on a less representative basis. The Conference recognized this fact and proposed, following the lines of the Australian Commonwealth, to empower the Senate to send down "suggestions" to the House of Assembly for reductions in money Bills; but, in order to avoid the difficulty created in Australia by the indefinite repetition of such suggestions, they are only to be made once, and fall to the ground if the House of Assembly does not accept them.

(ii) The impracticability of creating a Second Chamber of a non-partisan character is illustrated.

The Conference proposed to abandon nomination (except for native interests) and election by the Provincial Councils and to substitute direct elections which are certain to be fought on party lines.

(iii) The Conference was not asked to deal directly with the powers

of the Senate, any direct change of which would require to be ratified by an Act of Parliament; but an increase of its powers could be secured by raising its numbers, so as to increase its strength in the Joint Sittings in the House of Assembly, by which disagreements between the two Chambers are determined. The Conference, however, decided to retain as nearly as possible the existing ratio, by which the numbers of the Senate are one-third of those of the House of Assembly.

There is no substantial movement for any increase in the powers of the Senate. South Africa has problems fully as grave as those of the other Dominions before it, and as much need for careful revision of its legislation, but it shows no inclination to substitute for a "House of Review" a House which can destroy the Bills of the Lower Chamber.

The Dignity of a Peer.—The discussions in *Viscountess Rhondda's* case [1] brought out singularly little that was new in peerage law, but it shed interesting light on the functions of the Committee for Privileges. That body does not perform any judicial function proper, as was evinced by the fact that lay peers took part in its deliberations and swelled the majority which held that the Sex Disqualification (Removal) Act, 1919,[2] did not operate so as to enable a peeress in her own right to sit in the House of Lords. The decision, therefore, though it disposes finally of the precise issue, is not binding on any Court of Law, as Lord Wrenbury was careful to point out. This fact renders unimportant the somewhat marked divergence of opinion between the Lord Chancellor and Lords Haldane, Wrenbury and Dunedin on the possibility of admitting evidence of proceedings in the Lords as relevant to the construction of the Act of 1919. Even had the issue been decided in favour of admitting such evidence, it would in no way have altered the position that, when the House of Lords is acting as a judicial body, it cannot take anything save the Act itself as finally assented to into consideration.[3]

The Tunisia Dispute.—During the week ending January 12, 1923, the Permanent Court of International Justice at The Hague was occupied with the first issue of importance which has been presented for its opinion by Great Powers, namely, the Tunisia dispute between Great Britain and France. An extraordinary session was summoned to give an advisory opinion upon the following question submitted by the Council of the League of Nations:

> Whether the dispute between France and Great Britain as to the nationality decrees issued in Tunis and Morocco (French zone) on November 8, 1921, and their application to British subjects is, or is not, by international law, solely a matter of domestic jurisdiction in accordance with Art. 15, par. 8, of the Covenant of the League of Nations.

It was agreed between the British and French delegates on the League Council, Lord Balfour and M. Bourgeois, that if the Court should give

[1] [1922] 2 A.C. 339. [2] 9 & 10 Geo. V. c. 71.
[3] *Millar* v. *Taylor*, 4 Burr. 2332.

its opinion that the matter is not a domestic one, then the French Government would accept some form of arbitration or judicial settlement.

Counsel appearing at The Hague Court in the Palace of Peace for Britain were the Attorney-General, Sir Douglas Hogg, K.C., and his predecessor in that office, Sir Ernest Pollock, K.C. M. Mérillon, Procurator-General of the Court of Cassation in Paris, was the French agent, and the French case was submitted by Professor de Lapradelle. The Court consisted of eight of the International Judges, and two Deputy Judges. The Dutch President, M. Loder, presided, and the Court included the British and French judges, Viscount Finlay and M. Weiss. It should be noted that no judge on this Court purports to represent his State politically.

The short facts are as follows: as a result of four nationality decrees, persons resident in Tunis of Maltese origin, claiming British nationality, were treated by the French authorities in Tunis as French subjects, and were arrested for military service. Diplomatic action by Britain being futile to secure their release, the machinery of the League was at last set in motion.

The British case on the main issue, in brief, is that under the English municipal law of nationality these people are British subjects, inasmuch as the children born abroad of British parents, who are themselves born within the King's allegiance, and also the grandchildren, if born before January 1, 1915, of such parents, are natural-born British subjects. Moreover, it is claimed that British capitulatory rights still prevail in Tunis as against the Bey of Tunis, who, therefore, is debarred from conferring Tunisian nationality on British subjects.

The French case is as follows: two decrees were issued by the French Government conferring, or imposing (according to the point of view), French nationality on persons born in Tunis or in the French zone of Morocco, one of whose parents was justiciable as a foreigner by the French tribunals in the protectorates, and was born in the protectorates. There were also two decrees issued respectively by the Bey of Tunis and the Sultan of Rabat, declaring all persons born within their zones of power to be Tunisian or Moroccan, except French subjects or "ressortissants."

The French claimed that the Bey of Tunis and the Sultan of Rabat were entitled to take this course, and then to agree with the protecting Power, France, that French nationality should be substituted. The British capitulatory rights were claimed to have been renounced.

This issue of course raises the perplexed questions of nationality and exterritoriality in a very grave form, especially as Greek, Italian, and other European subjects are involved. On this occasion, however, it was not the business of The Hague Court to go into the merits of the matter, but merely to decide whether or not it is a domestic one for France alone.

Sir Douglas Hogg's argument was, therefore, devoted primarily to this

question in relation to paragraph 8, Clause 15, of the Covenant under which the matter had been referred to the Court. He submitted that matters of domestic jurisdiction are limited to internal matters within the area of the particular State in the ordinary usage of the phrase. He also invoked certain international conventions dealing with the subject to show that it was an international matter. He also urged that if the preliminary decision were against the French contention, the main issue would be decided judicially.

M. de Lapradelle devoted the bulk of his address to the merits of the case. " It is because a Power has the right to say to an individual, ' It is I who protect you,' that it also has the right to say to that individual, ' You are my citizen.' " This was his case in a nutshell on the main issue, which he declared to be a question for France alone. M. Mérillon, however, called for a decision on the entire issue, demanding that the Court should not limit itself to the preliminary point.

The opinion of the Court was reserved. As these pages are going to press *The Times* of February 8, 1923, records that on February 7, the Permanent Court of International Justice gave its decision to the effect that, according to international law, the considerations involved were not, as the French Government contended, of purely internal concern, and it accordingly gave a reply in the negative to the question submitted to the Court by the Council of the League of Nations.

The Hague Court will soon be called upon to give its opinion, at the instance of Great Britain, France, Italy, and Japan, on a question affecting the freedom of the Kiel Canal under the Treaty of Versailles, the Germans having refused access to a British vessel.

Japanese Bankruptcy Law.—A very elaborate Code of Bankruptcy Law was enacted last year for the Empire of Japan (Law No. 71 of the year 1922 as promulgated on April 25, 1922), together with a short complementary law (No. 72) dealing with compositions with creditors apart from bankruptcy. These have been translated into English by J. E. de Becker, D.C.L. The bankruptcy law is divided into four Books comprising respectively Substantive Provisions, Rules Governing Procedure, Rehabilitation, and Penal Provisions with some supplementary Rules. The Code consists of no less than 391 Articles, and would require, for its provisions to be fully appreciated, very considerable knowledge of the general law of property and succession in Japan. It is only proposed in this note to call attention to a few salient and general provisions as compared with the present English law.

First, as to the persons affected. These are defined by Art. 2 as " aliens or alien juridical persons," who are to be in the same position as Japanese subjects or juridical persons, but only when by the law of the country of the aliens Japanese subjects or juridical persons are in the same position. It would seem from this that English subjects are liable to be made bankrupt in Japan, but only in similar cases to those in which Japanese subjects would come under the English law, *i.e.* if

actually in the country, and so owing temporary allegiance to the law, or ordinarily residing or having a place of residence, or carrying on business or being a member of a partnership there (Bankruptcy Act, 1914, s. 1, sub.-s. (2).

Secondly, as to the property affected. This is confined to assets in Japan, and it is further provided that adjudications made abroad shall not be effective as regards them (Art. 3). The latter provision is of considerable importance, because the English Act purports to vest in the trustee of a bankrupt here all his assets wherever situate (Bankruptcy Act, 1914, ss. 38 and 167), and the Article in question seems to indicate that the Japanese Courts would not recognize the title of an English trustee. The date at which the right to administer a bankrupt's property vests in the administrator is the adjudication, and there is no relation back of his title (Arts. 6, 7 and 1), and the adjudication is also the period at which the claims of creditors are to be ascertained and fixed, neither subsequent interest nor damages for subsequent breaches of contract being, generally speaking, admissible (Arts. 15, 16 and 38).

Thirdly, dealings with the bankrupt or his property depend largely for their validity on whether or not the other party knew of the bankruptcy (see Arts. 56, 72, 83), while the rights of lien and other secured creditors appear to be preserved by what is called the Right of Exclusion (Book I, Chap. VIII, Arts. 92–97), and rights of set-off are given (Chapter IX).

The above matters are all dealt with in Book I under the head of "Substantive Provisions." Book II gives the procedure, as to which it will be sufficient to say that the creditors appear to have no power to choose a trustee, but all bankrupt estates are to be administered by an official or officials appointed by the Court, and called the Bankruptcy Administrator (Receiver), who is an officer of the Court under its supervision and control (Book II, Chapter III, Arts. 157–169). The creditors, however, may, if they like, appoint an Inspection Committee (Chapter IV). The Court which has jurisdiction is the "Local Court exercising jurisdiction over the seat of the principal place of business" in Japan, or, if the debtor has no business or place of business, the Court exercising jurisdiction over the debtor's "general forum" (Art. 105). A large Section of the law (Book II, Chapter IX, Arts. 290–346) provides for compulsory composition in bankruptcy as contrasted apparently with composition outside a bankruptcy dealt with by the above-mentioned separate law (No. 72 of 1922).

Lastly Book IV contains very severe penal provisions, by which various offences, including concealment of assets, and keeping insufficient trade books, if done with a view to promoting the bankrupt's own interests, or those of other persons, and for the purpose of prejudicing (injuring) creditors, render the bankrupt liable to penal servitude for a maximum period of ten years (Art. 374) while other offences, in-

cluding diminution of assets or increase of obligations by prodigality and extravagant expenditure or "owing to gambling and other speculative acts," render the offender liable to penal servitude for not more than five years or a fine not exceeding 5,000 yen (Art. 375). Bribery is also severely dealt with. Bribers and bribees may be sent to penal servitude for three years or fined 3,000 yen (Arts. 380, 381)

Institut de Droit Comparé.[1]—These three volumes represent the first-fruits of the research work now being carried on by the Institut de Droit Comparé of Lyons under the leadership of Professor Lambert. Reference has already been made in this *Journal* to the aims and activities of the Institute.[2]

Mlle Madier's monograph on the American Bar Association is an interesting study of the organization, methods and achievements of what is certainly the most active and powerful of all the societies of practising lawyers which exist at the present day. During the thirty-five years of its life this great Association has played a part in the development of the law which finds no parallel in any other country. Mlle Madier quite rightly stresses one of its principal activities, namely, the promotion of the uniformity of law between the different states of the Union, a movement which, up to the present, has met with considerable success, largely owing to the efforts of the Association. The purely professional aspects of the work of the Association are of course only touched on lightly, but emphasis is laid on the marked influence which it has been able to bring to bear on the teaching and study of the law in the United States. As Mlle Madier points out, these results have only been rendered possible by the fact that the Association embraces in its membership jurists of all categories, whether practitioners, teachers or judges, and is consequently free from the taint of sectionalism which has fettered the work of the great professional bodies, both in France and in England. In spite of the difficulty of compressing so wide a topic within the limits of a short treatise, Mlle Madier has succeeded in a very remarkable manner in presenting the gist of the subject to her readers in an eminently attractive and interesting form.

M. Maynard's study of declaratory judgments will appeal more particularly to French readers to whom this form of judicial activity is a novelty; but this is in no sense a reflection on its importance and utility. The science of what may perhaps for want of a better term be called "Comparative Legal Procedure" is still in its infancy, but its value is undoubted. Not only have the various countries of the civilized world much to learn from one another as regards the functioning of their legal machinery, but the growth of international industrial legislation under the ægis of the League of Nations has, quite apart from any other

[1] *L'Association du Barreau Américain*, par Mlle G. Madier (Paris: Marcel Giard); *Les Jugements Déclaratoires*, par Michel Maynard (Paris: Marcel Giard); *Allen v. Flood*, par Jean Fouilland (Paris: Marcel Giard).

[2] *Journal* (N.S.), vol. iv, part i, p. 84.

consideration, rendered this a subject of the very first importance. It is from this point of view that M. Maynard's little treatise is to be welcomed. It represents a reasoned attempt to investigate the working of the system of declaratory judgments in those jurisdictions which have adopted it, and to discuss the arguments in favour of its introduction into French legal procedure. Those chapters which deal with the adoption of the system in America and in Germany and Austria will more particularly interest the English reader. The learned author traces the development of the agitation in favour of the introduction of the system into the legal procedure of the United States, which, gaining strength under the fostering care of Professor Borchard and the support of the American Judicature Society and the American Bar Association, finally culminated in the Uniform Act on Declaratory Judgments. It is interesting to note that this Act is largely based on our own rules of procedure and more particularly R.S.C. Order 54A, but its operation is limited to Courts having jurisdiction in Equity. The federal or state authorities must be before the Court whenever the constitutional validity of a statute is challenged, and similarly local authorities must be represented where the interpretation of municipal by-laws is in question.

M. Maynard also deals with the German declaratory action known as the *Feststellungsklage* instituted by the Code of Civil Procedure, s. 256. German legal historians have been at great pains to link up this form of procedure with certain forms of action known to the old Germanic laws, but the evidence they adduce in favour of this view does not seem to be very cogent. M. Maynard devotes considerable space to the discussion of the various theories which have been formulated by German jurists, notably Hahn, Degenkolb and Wach as to the theoretical basis of the declaratory action, a matter which would strike an Anglo-American lawyer as being merely a barren controversy. This is probably because Anglo-American jurisprudence is prone to relegate all forms of judgment to the domain of procedure, and is therefore as a rule not concerned with any subtle analysis of the juridical nature of the form of a remedy. M. Maynard deals at length with the German procedure, and the conclusion which is forced upon one after reading this part of his treatise is that the English Rules of Court achieve equivalent results by much less circuitous and ponderous methods. Owing to the natural enthusiasm of a discoverer of new territory, M. Maynard has somewhat exaggerated the importance and value of the declaratory judgment in English legal proceedings, but otherwise one can have nothing but praise for the admirable and thorough way in which he has dealt with this difficult and obscure subject.

The third volume in this series consists almost entirely of a translation into French of the judgments and speeches in *Allen* v. *Flood*. It forms part of a projected series of translations of the judgments and speeches in the English leading cases dealing with the law of Restraint of Trade. M. Fouilland has prefaced the translations by a summary of

the law as it existed prior to *Allen* v. *Flood*, in which he traces the development of the principle first laid down in *Lumley* v. *Gye*. The translation merits high praise, as the task of giving the French equivalent for English legal technical terms is one of the very greatest difficulty. M. Fouilland has exercised the greatest care throughout in avoiding the pitfall of seizing upon terms or phrases which very nearly but still inaccurately correspond with those used by foreign systems of law. Similar volumes dealing with the *Mogul S.S. Co.* v. *McGregor Gow* and *Quinn* v. *Leathem* are in course of preparation.

These three volumes represent the output of a little more than a year's work, and they afford abundant testimony of the great value of the courses of instruction which are being carried on at the *Institut de Droit Comparé*. In conclusion, Professor Lambert is to be congratulated on having recruited what appears to be an exceptionally enthusiastic and extremely able band of students to assist him in carrying out his ideals.

American Journal of International Law.—The April 1922 number of the *American Journal of International Law* is the Washington Conference number. It opens with the report of the American Delegation ; next follows the President's address to the Senate ; and in the supplement are to be found the treaties and resolutions. The number also contains, among other interesting material, an editorial note on proposed amendments to the Covenant of the League of Nations, and the text of five further awards of the British and American Claims Tribunal.

The July number begins with two addresses by the American Secretary of State, the first dealing with the work of the American State Department, and the second with the conduct of the foreign relations of the United States. The principal articles in this issue are devoted to naval warfare. Professor Hudson distinguishes seizures in land and naval warfare ; Mr. Wise discusses visit and search, capture, angary and requisition ; and Mr. Sherman contributes an historical article on Orders in Council. After the editorial comment and current notes will be found the full text of the award of the Hague Arbitral Tribunal upon the claims of France against Peru—a dispute which was referred to arbitration a few months before the Great War—and of the report of the International Commission of Inquiry into the loss of the *Tubantia* in March 1916. The appendix contains a number of official documents of general importance.

The principal feature of the October number is a review by General Bliss of Meunier's book *Les Négociations Secrètes et les quatre Armistices*, which was published during the Peace Conference at Paris, and has now reached a fifth edition. But the number also contains an important paper on the negotiation of external loans with foreign governments by Charles Cheney Hyde, whose recent book on International Law as interpreted in the United States has received a warm welcome in England. Dr. Mettgenberg contributes an article on the extradition of the assassins

of Dato, and Mr. Sherman continues his historical study of Orders in Council. Mr. James discusses jurisdiction over foreigners in Siam. After the editorial comment the editors have printed the British report on the war trials at Leipzig and the text of the decisions. The appendix contains, amongst other useful matter, the rules of the Permanent Court of International Justice.

A Woman Judge of Ohio's Supreme Court.—In connection with the recent appointment of Judge Florence E. Allen as a Judge of the Ohio State Supreme Court, *The Outlook* of New York of December 13, 1922, gives the following sketch of Judge Allen's career: "She was born in Salt Lake City, graduated from the Western Reserve University, and received her law degree from the New York University Law School; practised law in Cleveland for five years; was appointed assistant prosecutor, and one year later was elected Common Pleas judge, in which position she has made a record for common-sense justice and efficiency. Judge Allen did not enter the primaries, but was placed on the judicial ballot by petition as an independent candidate after Democrats and Republicans had nominated two candidates each."

It is interesting to note that Judge Allen is the first woman to receive this honour in Ohio, and is believed to be the first woman Supreme Court judge in any of the States.

NOTICES OF BOOKS.

THE MINING LAWS OF SOUTH AFRICA—THE TRANSVAAL.[1]

This is the third volume of a series dealing with the Mining Laws of the British Empire, as also those of foreign countries, and it treats of the General Principles applicable to the Transvaal, South Africa, and, as stated in the Preface, the Transvaal is now one of the most important mining areas in the world. And such is, in fact, the case, yet it was owing to the sudden influx of a mixed mining population that a great pastoral country occupied principally by a pastoral community, who knew little or nothing of the hustle, the "rough and tumble" of busy commercial life, resented even a peaceful invasion, and with some regrettable results, chief among which was the Transvaal War.

After the war the country quickly settled down to ways of peace, and the gold-mining industry, which had for a time become practically suspended, proceeded to develop with leaps and bounds.

The first mining law, Volksraad Resolution, was passed in the year 1859, a prospective measure directed to the "Development of Mines." From that date law after law has come into being in rapid succession, until Laws, Proclamations, Ordinances, and Acts dealing with mining of all kinds, and the subjects cognate thereto, comprise very nearly one hundred legislative enactments.

To future generations the fact that the development of mining in the Transvaal was utterly distasteful to the early Transvaal Governments will be regarded with surprise, since the old Boer atmosphere of the days of Pretorius and Kruger, in which the presence of foreigners was altogether distasteful, will hardly be credited as having been a potent influence not friendly to the, supposed, anti-pastoral attitude of "out-landers" who came digging up the *Land* in the search after gold.

But "the old order changeth, giving place to new," and for many years past the Transvaal has been one of the principal gold-fields of the world.

The present volume is only Part I of the Mining Laws of South Africa, and comprises general principles applicable thereto in the Transvaal. The Governors of the Imperial Resources Bureau express approbation, in a brief General Introduction, of the assistance rendered by the Depart-

[1] *The Mining Laws of the British Empire and of Foreign Countries*, vol. iii. Part I: General Principles Applicable to South Africa: The Transvaal. (London: printed and published by His Majesty's Stationery Office.)

ment of Mines in South Africa, who undertook, what can readily be believed it was, the arduous task of reading and criticizing the MS. of the present volume, which constitutes a tribute to patient perseverance and research on the part of the author, Mr. Gilbert Stone, who, in the Preface, points out that the existing literature on the subject is small, and that consequently he has had to rely to a very large extent, not only upon a critical reading of the various laws, but also upon the perusal of the numerous judgments which have been delivered upon questions arising therefrom, and these, according to the Index of Cases, amount to nearly *one thousand*.

One pre-eminent advantage of the Union under a common Government of all the States of South Africa, saving Rhodesia, has been uniformity in decisions upon Mining Law.

To the ordinary "man in the street" it may seem a simple matter to start a gold, a diamond, or other mine. And so no doubt it is when the discovery is made upon public or Government ground, unfettered by any private rights whatsoever. It is far otherwise, however, when the discovery is made upon land in private ownership, the ownership in turn being some one of various kinds, such as "freehold," "quit-rent" (or *erffacht*), with rights and limitations incidental.

All sorts of holdings, with their attendant privileges or restrictions, such as a leasehold, life-interest, usufruct, or quasi-usufruct, require to be carefully regarded and considered, and much learning is found in Chapter I under the title "Mineral Contracts."

In Chapter II, entitled "Introductory," is found a very interesting definition of Gold and Diamond Mining Laws, respectively, and a very concise "Historical" survey of the laws relating to mining development in South Africa from the first *Volksraad* Resolution in the Transvaal in 1859, to the last of the fifteen Gold Laws or amendments down to the Gold Law of 1898.

The laws relating to base metals and diamonds only followed legislation regarding gold after many years, and the Diamond Law it is found was, until 1898, part of the earlier Gold Laws.

Clear and concise information is to be found in the chapters of this work on Prospecting, Discovery (Rights of the Discoverer), whether of Gold or Diamonds, which properly leads up to the Proclamation, by Government, and the effects thereof of a Public Digging. This in turn leads on to "Claims," and the pegging of claims, claim licences, etc.

Chapter VIII (Private Rights) sets forth the rights of a private owner, who may prospect his land for gold or diamonds, without any permit or licence, but merely by giving notice. The remainder of this volume deals with Mining Leases, and the rights acquired in virtue of a mining title are set forth in Chapter X. These rights are in respect of Surface User, Water, Stands, Trading on Mining Ground, Dealing in Minerals, etc., etc.

Fees, Licence Moneys, Rents, etc., form the subject of Chapter XI,

and the important subject, particularly so in the case of native labour, of " Employers and Employed " follows in Chapter XII.

Explosives, Penal Provisions and Penalties, Laws and Regulations comprise the remainder of this work, which is fittingly closed by an excellent Index. The volume will be found somewhat more than ordinarily interesting by reason of the fact that it sets forth conditions of mining operations in a country the land of which was already appropriated, or subject to legal conditions, long before mining development was contemplated. Water, of course, in a country liable to shortness of rainfall, and droughts, is not omitted, for no one can embark upon industry connected with land or mining in South Africa without careful consideration of water facilities.

H. T. Tamplin.

DR. POUND ON LEGAL HISTORY[1]

To those who cherish the common heritage of Anglo-American law, the writings and teaching of Dr. Roscoe Pound, Dean of Harvard Law Faculty, are well known. Last year he paid a warmly welcomed visit to Cambridge University. The lectures he then delivered on the interpretation of legal history are now reprinted as a volume in the admirable series of *Cambridge Studies* produced under the general editorship of Professor Hazeltine.

In a short compass, but with immense learning and perfect clearness, Dr. Pound reviews the processes and ends of legal thought from antiquity down to our own time. He maps out the contributions of religion, ethics and metaphysics, of biology, economics and politics. The lawyers and jurists do not have the stage to themselves ; they share it with Kant and Hegel, with Darwin and with Benedetto Croce. A rough summary would show the modern world relying upon authority from the twelfth to the sixteenth century, upon philosophy in the seventeenth and eighteenth, and upon history in the nineteenth. Dr. Pound's particular concern is with the historical school and the nineteenth century, towards which he plays the part of candid friend.

The nineteenth-century historical school established itself in the reaction from Benthamism. A Bentham is deliberately indifferent to legal history. He does not want to understand existing law, but to overthrow it, for he optimistically believes he can produce a better system by the light of pure reason. A Savigny, on the other hand, declares that law must be understood before it is reformed, that there is a unity of past and present, and that by observation and research we arrive at the intelligent statement of principles. This is the creed of the historical school, but in turn, as Dr. Pound shows, it is discovered to have the defects

[1] *Interpretations of Legal History.* By Roscoe Pound, Ph.D., LL.D., with an Introduction by H. D. Hazeltine. (Cambridge: Univ. Press. 12*s.* 6*d.* net.)

of its qualities. Things are not reasonable because they are historically familiar. It will not always do to say that law is found, not made, or that there is but a single cause at work in legal history or but a single idea capable of explaining all phenomena. Concentration on history leads to juristic pessimism, to a feeling that legislation and criticism are futile, to the abrogation of the jurist's function. Twenty-five years ago Mr. Justice Holmes began to attack the historical school wherein he himself had laboured. He found it indifferent to the improvement of law, unsympathetic to social claims whereof the rules of law should take account, too easily satisfied that any rule is good and necessary if it can only be traced back to the Year-books. As the nineteenth century ended the attack made progress. Maybe the influences of the war assisted it. There had grown up a sense of what Dr. Pound calls the unification of the social sciences. His own view is clearly stated. He has no use for a system which fortifies and revives doctrines which are crumbling and obsolete, loads them with exceptions and anomalies, and thus retards the recognition of social and commercial needs. He wants more Mansfields on the bench. He wants the jurist to come forward and do creative work. The writer and the teacher must lead the law-courts and the legislatures, not follow them with a mere systematizing and reconciling analysis. His own ideal he describes as " the engineering interpretation."

> Engineering is thought of as a process, as an activity, not merely as a body of knowledge or as a fixed order of construction. It is a doing of things, not a serving as passive instruments through which mathematical formulas and mechanical laws realize themselves in the eternally appointed way. The engineer is judged by what he does. His work is judged by its adequacy to the purposes for which it is done. We are beginning, in contrast to the last century, to think of jurist and judge and law-maker in the same way.

It is a noble ideal, finely developed. Law would be no longer dull but lively, lawyers no longer parasites but social reformers. We must respond to the trumpet-call without sloth or faint-heartedness. For, alas ! lawyers are a timorous tribe ; they scent revolution in every reform. And, alas ! the administration of justice more often resembles humdrum rule-of-thumb plumbing than the construction of the Panama Canal. Though some fine philosophic articles appear in the Irish Free State Constitution, there is so seldom a chance for a clean sweep and a fresh start. Teachers of law, it is true, are free to project their own great constructive schemes, but they must beware of digging a ditch between academic and professional law.

Meanwhile, what are we doing here in the twentieth century ? Are there any signs of progress ? Perhaps judicial ignorance seems less blind to what goes on in the world. A High Court judge has lately spoken disrespectfully of actions for breach of promise of marriage. County Court judges may yet manage to solve the rent restriction puzzle. Only three years ago we adopted a sweeping new principle of sex equality

(except, it seems, where a woman is a peeress). Parliament last year freed its Expiring Laws Continuance Act of a load of old lumber. Certainly the historical school had the worst of it over the Law of Property Act. We must make the most of these achievements, for Dr. Pound's implied indictment seems (though his generalizations are entirely impersonal) to place some of our most honoured textbooks and teachers upon their defence. Not to mention the living, let us think, for example, of Maitland. Did Maitland belong to the nineteenth century, or to the twentieth? Was he of the historical school, blind to social progress and contemptuous of metaphysics? He did indeed beckon us to the Year-books, but he also pointed the way to those pages of Gierke wherein groups emerge as something more than legal fictions. Historical scholarship need not end in a museum; it can help us onward on the open road. The historical idea in the nineteenth century did good service. As Dr. Pound himself admits—for his chapters, if challenging, are scrupulously fair—it produced a sounder account of Roman, Germanic and English law, and it laid solid foundations in place of the brilliant superficiality and the false history of the eighteenth century.

The *Interpretation of Legal History* takes the student far afield, but under wise leadership. Especially valuable is the light thrown on the relative development in England and the United States of particular legal ideas. The book is a contribution not less to learning than to thought. Philosophers and historians as well as lawyers will enjoy it, and none more than the readers of this *Journal*, whose interest lies in comparative legislation.

CECIL T. CARR.

DOCTORS' COMMONS AND THE OLD COURT OF ADMIRALTY.[1]

THIS is a succinct and pleasantly written account of the history of the civilian lawyers in England. The author refers to many authorities, including such standard collections of records as Mr. R. G. Marsden's edition of the Admiralty Court documents; and he traces in clear sequence the introduction and development of Roman law in this country, its struggle with the native common law for pre-eminence, and its deflection ultimately to certain branches of law, with which the territorial law could not deal adequately, viz. cases involving international considerations or the interests of foreigners, like the Admiralty jurisdiction over mercantile and maritime matters and the Court of Chivalry for the laws of war. But it is the personal aspect of the system in its professors, and their actual part in the historical progress of our law that the author sets out to sketch for us—and this constitutes the real interest of the book. The

[1] *Doctors' Commons and The Old Court of Admiralty.* A short history of the civilians in England. By William Senior, of the Middle Temple, Barrister-at-Law. (Longmans Green & Co. 1922. 112 pp.)

College of Advocates, though a voluntary association till its formal incorporation in 1767, was recognized as a special legal profession of laymen by Elizabeth's reign and can be traced back in records to the beginning of the sixteenth century. It was known as Doctors' Commons by 1535; and it was successively housed in Paternoster Row (the Queen's Head Tavern) and Knight Rider Street (Mountjoy House) from 1567, which was destroyed in the Great Fire of 1666 and rebuilt, and then continued their home till the dissolution in 1857. The services of the civilians were largely made use of, especially under the Tudor sovereigns, from the fourteenth century till the close of the seventeenth, in diplomatic missions and judicial commissions, for administering justice between British subjects and foreigners under treaties; and in the administration of the Admiralty jurisdiction, which applied general maritime law, e.g. *Consolato del Mare* (Courts of Admiralty, Delegates and Requests). They were also doctors of the canon law and practised in the ecclesiastical Courts, which had jurisdiction over matrimonial and testamentary matters. At the beginning of the seventeenth century the antagonism between the civil law and the common law came to a head. The first two Stuart sovereigns favoured the civilians, and took their political support for granted, though in the Civil War they were found on both sides; but Sir Edward Coke, on the other side, opposed every claim of theirs, and by the end of the century the common law Courts made good their supremacy, and extended their own jurisdiction to commercial matters, which had been hitherto left to the Admiralty. The civilians, however, continued to hold their positions as experts in international legal questions; they were often consulted by the Government, and gave joint opinions on such questions with the common law officers, and during the eighteenth century they were employed as diplomatic representatives especially for treaties. This decline of their position from two centuries before, when their advice exclusively was sought by the Crown, was inevitable from the time when the independence of the judges from the control of the Executive was constitutionally fixed, the common law officers took a larger part in all questions concerning the rights of subjects and others under the national law, and the replacement of legal consultants by regular diplomatic ministers for international questions has followed as a natural development. But there was certainly no lack of distinguished civilians in the eighteenth century, nor any shortage of public work by them, to justify a charge that their profession was a moribund one; and during the Napoleonic wars their contributions to the judicial fabric of Prize Law were invaluable.

The chief criticism of the work as a whole which suggests itself is that the author's attitude to his subject as a "lost cause," which derives its chief interest from that fact, seems a little unsympathetic; and the rather reluctant admission of the merits of the institution in the final pages hardly seems to do justice to the various evidences which he has woven together so interestingly of the many-sided

activities of the civilian lawyers of this country, and the important public functions which they exercised. The very existence of such an association of specialists, side by side with the Common Law and Chancery Inns, is an important factor in our legal history ; and the author himself states that " the whole story of the influence of the Roman law on the growth of English law throughout its development has still to be written." Certainly the record of the College of Advocates will bear comparison with that of any other legal society in its contribution to legal science in this country ; and it has rendered invaluable service in keeping the principles of the Roman law in force in certain branches of law, especially international law, and thus maintaining a connexion between our own and the Continental systems of law, which is important in questions involving the consideration of foreign laws and the interests of foreigners. In this present year the new Academy of International Law at The Hague, which is in close connexion with the Permanent Court of International Justice, is to be inaugurated. This history of the earlier English institution, for a like purpose, which is the object of this work, will be a help to all students to understand better the growth of the science and its intimate interweaving with political history.

G. G. P.

INDUSTRIAL ARBITRATION AND CONCILIATION.

Mr. Justice Higgins, of the High Court of Australia and President of the Commonwealth Court of Conciliation and Arbitration, 1907–21, has just published an interesting book which he calls *A New Province for Law and Order*,[1] and in which he describes the work done by that Court, and the part it has played in maintaining industrial peace and harmony. The book consists of three articles originally written for the *Harvard Law Review* of November 1915, January 1919 and December 1920, now amplified and brought up to date ; these are supplemented by chapters giving the author's views on the future of industrial tribunals in Australia and his statement of reasons for his resignation as President of the Court.

In Great Britain industrial arbitration is purely voluntary, and the Government has no power to impose it either upon employers or trade unions. But in Australia, in each individual State so far as labour disputes are concerned which are wholly confined to that State, and in the Commonwealth in respect of disputes which extend beyond the confines of any one State, compulsory arbitration can be imposed upon both sides in the dispute by state and by federal law. Both the State and the Federal Arbitrative Courts have been left

[1] *A New Province for Law and Order*, by Henry Bournes Higgins, M.A., LL.B., Justice of the High Court of Australia and President of the Court of Conciliation and Arbitration, 1907–1921. (London: Constable & Co. Ltd., pp. vi, 181.)

to work out their own salvation and to formulate their own principles of deciding all the thorny industrial controversies which come before them. The book is exceedingly valuable for its clear and logical enumeration of the working rules and principles on which the Commonwealth Court has progressively elaborated a basis for the settlement of wage and other disputes. Mr. Justice Higgins is a strong believer in the efficacy of compulsory industrial arbitration, and the facts and arguments which are adduced in support of his opinion are worthy of the most careful consideration; but there are certainly two views on the matter in Australia. It was only last year that the Premier of South Australia introduced a Bill to modify, if not indeed in essential particulars wholly to abrogate, the system of compulsory arbitration prevailing in that State, on the ground that by arbitration wages had been forced to such a high and non-economic level that industry was being severely injured; but the Bill was withdrawn in view of the opposition of organized political labour. It is not uninteresting to observe that, while the chief objection in Great Britain to compulsory arbitration has emanated from Labour, in Australia, on the other hand, Labour has been its chief supporter.

The most important part of the book is the Appendix "B" containing the statement made in the Industrial Court by Mr. Justice Higgins on September 25, 1920, when he resigned by way of protest against the Government policy as embodied in the Industrial Peace Act, 1920. By that Act the Government took power to appoint special tribunals to hear and determine any industrial dispute in the Commonwealth. Mr. Justice Higgins pointed out the difficulty—and it is a very real one—of the Commonwealth Industrial Court, which cannot enforce its own decrees, attempting to command public confidence if any group of employers or trade unions who failed to secure their demands from the Industrial Court could put pressure upon the Government to appoint a special tribunal, and then obtain from the latter the whole or any part of their claims which had been refused by the Industrial Court. Mr. Justice Higgins said "a permanent Court of a judicial character tends to reduce conditions to system, to standardize them, to prevent irritating contrast. It knows that a reckless concession made in one case will multiply future troubles. . . . The objectives of the Permanent Court and of the temporary tribunal are, in truth, quite different; one seeks to provide a just and balanced system which shall tend to continuity of work in industries generally, whereas the other seeks to prevent or to end a present strike in one industry. . . . A Permanent Court working on a reasoned system and for many industries cannot function in competition with temporary tribunals created to avoid or end a specific strike in a specific industry. A tribunal of reason cannot do its work side by side with executive tribunals of panic."

It will be a matter of the greatest interest to see how the Commonwealth Government's new industrial policy will work out, and whether the fears of Mr. Justice Higgins will materialize. Much industrial unrest

—in some cases industrial catastrophe—was produced in Great Britain during and immediately after the war by somewhat similar policy, when the Cabinet, to which trade unions habitually appealed from the decision of the Committee of Production, and later the Interim Court of Arbitration, allowed claims which had been disallowed by those tribunals. After all, it is only human nature for a litigant to make use of all the legitimate means and machinery at his disposal, in order to win his case.

L. M.

THE NATURE AND SOURCES OF THE LAW.[1]

Professor J. C. Gray, the author of this interesting and suggestive work, is perhaps better known as a great authority on the English law of perpetuities than as a thinker in the speculative regions of theoretical jurisprudence. Yet behind all the practical legal work of a long and laborious life, Professor Gray for more than half a century had thoughts about the dim beginnings of the Law, and in the year 1908 he delivered at Columbia University the course of lectures that appeared in book form in 1909. The author dated his preface on July 14, 1909, his seventieth birthday, and for the next six years followed current thought on the general problems of jurisprudence. At the time of his death in 1915 he had made notes for a second edition, intended to reach a larger circle of readers. Mr. Roland Gray has now carried out his father's wish, and here we have in final form the views of this distinguished American lawyer on a subject that to-day is greatly moving the minds of men.

Professor Gray does not approach the subject of the Nature and Sources of the Law from the historical point of view, though he does not forget that aspect of the subject. His subject is not "law," but "the Law"—and the distinction is very real. In the minds of various thinkers to-day the only sound method of approaching the origin of Law is to treat it from the point of view of the natural history of law, and to watch its evolution as something itself subject to law, and as something which enshrines, from the first till the latest jurisprudence, certain perdurable principles of human relationships. At the very moment when one eminent American lawyer is declaring that the historical method has crumbled into dust, we see investigators in all regions of the earth peering into the hidden bases of Law by means of the comparative investigation of customary law. Professor Gray had not this scorn for the historical method, but that method was not his instrument of investigation. He began with Austin, and though he realizes very fully the weight of the modern attack on Austin's methods and conclusions, he yet follows the main idea of Austin that "the law" is something that has to be explained

[1] *The Nature and Sources of the Law.* By John Chapman Gray. Second Edition, from the author's notes, by Roland Gray. (The Macmillan Company.)

as a phenomenon enshrined in working rules, that it is at the mercy of the State. He holds that :

> There is no mysterious entity "the law" apart from these rules ; and that the judges are rather the creators than the discoverers of the Law. . . . It has been sometimes said that the Law is composed of two parts,—legislative law and judge-made law, but, in truth, all the Law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute.

It is not the purpose of this notice to enter into a discussion on so vexed a question, but rather to put forward the point of view of this distinguished practical lawyer. But it is not easy to grasp this point of view without feeling that Professor Gray is endeavouring to limit the conception. He begins, indeed, with a very limited conception of law. "The law," he writes, "of a community consists of the general rules which are followed by its judicial department in establishing legal rights and duties." This limitation seems rather an avoidance of fundamental difficulties than a full solution. It is, indeed, a solution within limits, and fails, perhaps, to meet the innumerable cases where the law is actively operative, without anything in the nature of a judicial department to establish legal rights and duties. This is not only the case in remote tribal regions. It is true wherever customary law operates. Professor Gray would, no doubt, have answered that in organized societies there is the judicial department ready to determine the custom if any dispute arises. But that seems to be no answer, since there are widely extended customs which require no proof, which prove themselves. Professor Gray admits or declares that "conclusive evidence is not evidence at all ; it is something which takes the place of evidence and of the thing to be proved, as well." Hence such customary law as gavelkind in Kent is something that stands outside Professor Gray's conception of law, and yet it rules a large region. What is true of customs that require no formal proof is true of a great body of undoubted law in tribal areas, and hence it is doing no injustice to Professor Gray's incisive argument to say that "the law" which he conceives does not cover the whole region of operative law.

On the other hand, Professor Gray's analysis has the great advantage of giving what we may almost call a new reality to the law within the region that his definition covers. He dispenses with the difficulties that have haunted generations of thinkers. Jurisprudence—

> Need not vex itself about the "abysmal depths of personality." It can assume that a man is a real indivisible entity with body and soul ; it need not busy itself with asking whether a man be anything more than a phenomenon, or at best, merely a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with points, lines and planes.

We entirely agree that this is or should be true in a work-a-day world. But the difficulties of the limitation at once fly to the mind. To-day medical jurisprudence is boldly attacking the doctrine, and is endeavouring to set up in criminal cases standards of conduct that entirely turn on "abysmal depths of personality." If society is to remain intact we must hold on to Professor Gray's practical standard, even though we have to defy—a not unpleasant task—the new psychology. As practical people we must take man "as a reality and work with him, as geometry works with points, lines and planes"; but it still has to be remembered that geometry itself has not been immune from attack, and that the Theory of Relativity may be even more dangerous in its application to jurisprudence than it is to the classical theory of physics.

But if Professor Gray stands for the average man as the subject of the law, he is still more determined to destroy certain fictions of law, though he admits with Maine, that fictions of the historical type are almost a necessity of the Law at a certain stage of human development. He does not attack dogmatic fictions used to aid symmetrical classification in law, but points out that "though handy, they are dangerous, tools." But for historic fictions he has no mercy in so far as they are put forward in our day. He seems to regard as a fiction Savigny's view that the foundation of the law has its existence, its reality in the common consciousness of the people. That view is one for which the present writer has strongly argued,[1] and it is interesting to read the counter-view.

Professor Gray admits that—

> In the countries of the English Common Law, where the judges are the jurists whose opinions go to make up the Law, there would be less absurdity in considering them as expressing the opinions of the people; but on the Continent of Europe, in Germany for instance, it is difficult to think of the unofficial and indeterminate class of jurists, past and present, from whose writings so great a part of the Law has been derived, as expressing the opinions of the people.

It is of course only with great deference that this view should be met; but the admission with respect to the law of England is of great importance, and it may be contended that it should be extended to the Continent of Europe for the apparently simple reason that, though those countries are under code law, yet those codes in a very large measure are the fruits of customary systems of law which existed in active popular operation for many centuries. But Professor Gray adds:

> Those that hold that jurists are the mouthpieces of the popular convictions in matters of law have never been able to deal satisfactorily with the reception of the Roman law in Germany, for that Law was brought in not only without the wishes, but against the wishes, of the great mass of the people.

This conclusion, however, seems to overlook certain very significant points which appear to confirm the opinion on the subject of that very

[1] *The Natural History of Law.* (Oxford University Press, 1922.)

great thinker and jurist, Savigny. First of all, the original customary law of the Germanic area was Aryan, and had many points in common with the earliest forms of Roman law. Secondly, the codes which became operative through the area on the dissolution of the Western Empire were a strange mixture of the Theodosian Code and of this customary law, and these codes seemed specially designed to meet the social needs of the people. The formal reception of Roman law in the fifteenth century may or may not have been desired by the common people, but in any event it was a legitimate development, and almost an enshrinement of a customary law that had much in common with the Roman origins. The present writer ventures to submit that Savigny's doctrine is not in any sense fictional, but a brilliant exposition of universal historical truth.

Professor Gray, however, attacks with weight the doctrine that there is such a thing as a body of law *in gremio*, which is from time to time discovered and declared by the judges to meet new cases. He attacks with pointed irony the belief in "pre-existing law." But surely there is a deep truth involved in the conception, a truth that the scientist and the philosopher would not brush aside with hasty hand. The truth in question is the capacity of a body of legal conceptions to grow as a living, organic thing. No doubt it is a difficult thing to believe that there is inherent in some protoplasmic substance the minds and souls of great men, but surely it is a truth, and not less a truth, because from the same primordial organic stuff have also sprung what seem to us perversions of creation. If there are broad ultimate principles that reside in the consciousness of man, it is not an unreasonable thing to say that when these principles emerge in action, in juristic action, they had always existed potentially. It is not merely a question of Courts making *ex post facto* law. It is something far deeper than that. It is an enunciation of the principle that the Law is an abiding possession of the human race, and that with the race it grows and wins new kingdoms, from new environment, for the human personality.

These comments are not intended as adverse criticism on a singularly sane and helpful work. They are intended to show that there are, outside the definite limits within which Professor Gray confined his investigations into the nature and sources of the law, regions of investigation, juristic and philosophic, into which, whether we wish or not, new generations will peer with hungry eyes. But Professor Gray's work calls us back to "our earth here" as it now is, and pleads for a practical outlook on a practical world of jurisprudence without continual inquiry into the psychology of the subjects of law or into non-Euclidean conceptions of law itself. It is not his business to deal with the "obstinate questionings" that face those who attempt to deal with the natural history of law; it is his business to deal with the rule of law as it is "created" and put in force by judges in highly organized communities. To say that he has performed his task in a fashion beyond praise is almost unnecessary.

J. E. G. de M.

HISTORICAL JURISPRUDENCE.

In the second volume of his *Outlines of Historical Jurisprudence*,[1] recently published, Sir Paul Vinogradoff deals with the "Jurisprudence of the Greek City," limiting his enquiries, with some few exceptions, to the fourth and fifth centuries B.C. He explains in a short preface that this is an attempt not to enumerate the details of Greek positive law but to reconstruct on quite general lines the principles of jurisprudence underlying the Greek democracy.

Students of the subject cannot be otherwise than grateful for the great work that is here accomplished, and they will find both interest and help, and much material for thought in a comparison of the Greek conception of law with that of more modern times.

Comment has been passed before in this *Journal*[2] on the extremely wide use made of the term jurisprudence by Sir Paul Vinogradoff, and this is well demonstrated in the present volume by an analysis of the Table of Contents. The jurist and metaphysician will find common ground in the summary of Greek philosophy which is given in the chapter on "The Concept of Law," the historian and the sociologist in "The Structure of the City." "The Law of the Constitution" appeals primarily to the historian, and the following chapter, "Relations between Cities," to professors of international law whether public or private. The student of politics and economics finds material in "The City and the Citizen," while positive law is represented in the final chapters on "Crime and Tort," "Property and Possession," and "Conventions and Transactions" (both of which seem better described by the more familiar "contract"). The remaining chapters, "The Legal System," and "The Sources of Law," seem the more peculiar province of the jurist and most properly the study of jurisprudence. Of the two the former is of the greater interest as showing the marked contrast between the ancient and modern conceptions of justice.

To the Greek citizen justice was of twofold character, and the implications of the term are sometimes difficult to follow in consequence of a certain confusion between its legal and its ethical connotations. This appears clearly from the classification of the different kinds of justice quoted from the *Nikomachean Ethics*: (1) General Justice, which is a complex of all the rules formulated by the State as legally obligatory for the members of the community. (2) Justice as a particular or specific virtue, which is the set of rules governing the relations between the members of the community. This, again, is divided into (*a*) Distributive Justice, which governs the equal or proportionate distribution of property, honours and profits, public assistance or public duties and burdens;

[1] *Outlines of Historical Jurisprudence.* Sir Paul Vinogradoff. Vol. ii. (Oxford University Press. 1922.)

[2] See *Journ. Soc. Comp. Leg.*, vol. iv, pt. 1, p. 352.

and (*b*) Corrective Justice, or legal redress. But legal redress has also a twofold nature according as the obligation to be observed is founded on a voluntary or an involuntary agreement; in other words, whether it arises from a contract or from a delict or tort. It is only possible here to pick out somewhat arbitrarily a few special points for notice, and in this connexion the most striking is the Greek attempt to equate the ethical with the mathematical: "Disputes covered by distributive justice are to be settled according to geometrical proportion, whereas compensation in disputes arising out of corrective justice is to be adjudged according to arithmetical proportion." Further, all these different types of justice were equally subject, as in other systems of law, to the modifying influence of ἐπιείκεια, or equity, if that term be used in the sense in which it was originally employed in English law.

To return to General Justice. This finds practical expression in two classes of enactments: (*a*) those laying down what the citizen must do or abstain from doing (based on public utility and convenience whether corresponding or independent of ethical standards); and (*b*) those concerning the rights of property and possession.

But it is not so much in its working as in its underlying idea that General Justice concerns the student of Comparative Jurisprudence. For it is in the conception of the relation of the citizen to the City-State that Sir Paul Vinogradoff finds not only an important factor but the one link connecting all aspects of his subject, and that which makes a systematic theory of Greek jurisprudence possible. What was that relation? The citizens were the City, and yet the City was at the same time something over and above the citizens considered numerically. That the City was primarily the complex of the individuals composing it is graphically illustrated by the instances in which a City was transported—as it were bodily—to other latitudes in consequence of home disturbances or conquest, but nevertheless retained its identity. Yet the City never attained the position of a mere ideal abstraction, and this surely arose from the practical reason that a real and definite control was exerted by the citizens as individuals over the actions of those same individuals in their character of "the City." Numerous examples are furnished by Sir Paul Vinogradoff of the means by which this control of the City by the citizens was effected, and they form not the least interesting reading out of the many instructive examples with which this book is illustrated. Such are the many occasions on which it was competent to the private individual to bring an "accusation" against a magistrate or other official. Such, again, are the regulations for the oversight of officials by means of εὔθυναι and ἐπιχειροτονία, for the procedure to be adopted before any new provision could become law, for enforcing the responsibility of the orator proposing new legislation should that legislation prove unsuccessful, and for the various types of State or political trials.

Another matter of interest to the modern jurist is the attitude of the Greek δῆμος to the subject of crime, chiefly because of its wide divergence

from the modern view. In the Greek City crime was in the majority of cases a matter for the individual most directly concerned by reason of his injury, and it lay with him to proceed against the offender. In these circumstances it is natural to find a large measure of self-help allowed, and when positive law did interfere to find that it did so on the basis of recognizing self-help but confining it within certain bounds. Again as a necessary consequence perhaps of this way of regarding the matter, it was optional to the aggrieved party to proceed by way of action or of criminal proceedings (as they would now be called), in the latter case at the risk of a fine if unsuccessful. But in this state of affairs it is perhaps surprising and somewhat inconsistent to find that the moral aspect of at least four offences was sufficiently the concern of the people corporately to render the commission of any one of them a disqualification from the privilege of addressing the Assembly.

The predominant feature in the Greek conception of property is perhaps what is to be expected from the conception of the City—that is, the absence of any absolute ownership by individual citizens, and this again leads naturally to arbitrary interference with the rights of individuals such as to the modern jurist seems subversive of the rule of law.

It is impossible here to give in any detail the elaborate provisions, whether as to substantive or procedural law, which are to be found in full in this exhaustive account by Sir Paul Vinogradoff, but passing mention should be made of two more points. (1) The recurrence in most, if not all, actions and charges of a twofold procedure—a preliminary hearing followed by a final adjudication ; and (2) the large number of actions which were necessarily called into being to counteract the effect of other actions and which to that extent may be said to have arisen out of those very actions of which they were contradictory. Such, for example, is that which lay at the suit of a successful defendant to an unjust "accusation," conceived to destroy or at least discourage the growth of a class of professional sycophants.

To sum up, it is submitted that enough has been said to show that Sir Paul Vinogradoff has amply justified his belief that a general Greek jurisprudence was capable of reconstruction and its keynote is best given in his own words: "The State was all-powerful as against the single citizen, but at the same time it was regarded not as a being separate from its live members, but as a complex of citizens, whose interests and rights are not differentiated from the interests of the 'corporation.' Hence, on the one hand, the use and abuse of political power for the satisfaction of personal needs and cravings ; on the other hand, the ruthless exploitation of private property in the interests of the majority. One might almost say that with a slight change Bentham's idea of the aim of political union could be applied to this system ; it was directed towards the greatest advantage of the greatest number of citizens."

MONICA M. GEIKIE COBB.

THE SCIENCE AND ART OF DIPLOMACY.

Sir Ernest Satow, whose knowledge and experience of diplomacy is unrivalled, and whose success in the practice of that distinguished profession was notable, recently published the second edition of his well-known *Guide to Diplomatic Practice*.[1] The first edition of this book —of its kind unique in this country, for while we were the practical exponents of the great principles of international negotiation, it was left to other countries to be their theoretical expositors—has made itself indispensable to diplomatists, invaluable to international lawyers, and of the greatest assistance to commercial men, whose operations in the sphere of international trade have been, since the war, almost inextricably involved in international complications. In it the scientific student of history has found many of the dark places in ordinary historical manuals illuminated, and the general man of affairs discovered much of absorbing interest.

To those acquainted with the first edition it may be mentioned that the chief revisions consist of the excision of the Russian Court ceremonial for the reception of foreign diplomatists and their wives, and its rules governing precedence among such persons, and of an enlargement of the section on Conferences in Chapter XXVI, Vol. II, so as to include the Peace Conference of Paris, 1919. In Chapter III, Vol. I, the history of the important office of Secretary of State for Foreign Affairs has been rewritten ; and the account of diplomatic archives in various European countries has been enlarged. In Chapter X an account is given of the ultimatums delivered in 1914 before the Great War.

When one considers the number of business men, politicians and other novices who undertook diplomatic office and missions during the war with strong determination to introduce " business methods " into diplomacy, it is significant to note that the author of this book can register no change in diplomatic practice up to the present date. It is clear that the practices of diplomacy are really canons of experience, and not mere conventions of expediency.

" Diplomacy," says the writer, " is the application of intelligence and tact to the conduct of official relations between the Governments of independent States, extending sometimes also to other relations with vassal States." That this demands outstanding qualities of discretion and judgment in the negotiator few will gainsay. It was really Disraeli, with characteristic insight, who first familiarized us with the expression " diplomatic " as indicating " the displaying of address " in negotiations or intercourse of any kind, not merely between nations.

One of the most attractive chapters in Book I is Chapter IX,

[1] *A Guide to Diplomatic Practice.* By the Right Hon. Sir Ernest Satow, G.C.M.G., LL.D., D.C.L., Second and Revised Edition. 2 vols. (London : Longmans Green & Co.)

"Counsels to Diplomatists." This might with benefit be read by anyone who in any capacity has negotiations to undertake. To the list of distinguished counsels recorded in this chapter, the author says in this second edition he would only desire to add that "the task of a diplomatic agent is to reconcile the interests of his own nation with those of others and to preserve the honour of his own unblemished and devoid of selfish aims; in short, to cultivate what has been so well described as the international mind."

Those who are not acquainted with the work may find it useful to know that Vol. I deals first with diplomacy in general, precedence among States and among Sovereigns, the language of diplomatic intercourse and the forms of documents, and secondly with diplomatic agents, their rights, their classification, their immunities and privileges, and the constitution and methods of, action of and customs applicable to, "the diplomatic body" at any capital,

The second volume deals with international meetings and transactions; describes the shades of difference which exist between Congresses and Conferences—though, from the point of view of international law, both are meetings of plenipotentiaries for the discussion and settlement of international affairs. Conferences have a less formal character than Congresses, and their adoption was a natural development from the Congress of Vienna, and the necessity it created for constant meeting between the Five Powers in order to direct generally the affairs of the Continent.

We live in days of discussion—when, as between nations, negotiation will, it is hoped, supersede force, and arguments and the logic of humanity and common economic interests replace the field of battle by the Council-chamber. A Congress to-day is far removed from Rousseau's conception. His sarcastic gibe may be remembered:

> Il se forme de temps en temps parmi nous des espèces de diètes générales sous le nom de congrès, où l'on se rend solennellement de tous les Etats de l'Europe pour s'en retourner de même; où l'on s'assemble pour ne rien dire; où toutes les affaires publiques se traitent en particulier; où l'on délibère en commun si la table sera ronde ou carrée, si la salle aura plus ou moins de portes, si un tel plénipotentiaire aura le visage ou le dos tourné vers la fenêtre, si tel autre fera deux pouces de chemin de plus ou de moins dans une visite, et sur mille questions de pareille importance, inutilement agitées depuis trois siècles, et très-dignes assurément d'occuper les politiques du nôtre.

The purpose of all congresses and conferences is to secure international compact or engagement in some one of the following forms: (i) Treaty, (ii) Convention, (iii) Additional Articles, (iv) Acte Final, (v) Declaration, (vi) Agreement, (vii) Arrangement, (viii) Protocol, (ix) Procès-verbal, (x) Exchange of Notes, (xi) Reversale, (xii) Compromis d'Arbitrage, (xiii) Modus Vivendi, (xiv) Ratification, (xv) Adhesion and Accession. Which of these forms shall be adopted in a particular case is partly a matter of convenience and is partly determined by usage, but the matter is discussed fully in the book. Then comes the process of ratification,

adhesion or accession, which in turn are clearly distinguished and explained. Lastly, in Vol. II, the author states at length the difference between "Good Offices" and "Mediation," a distinction commonly overlooked and seldom clearly apprehended.

"Good offices are exerted in order to compose differences between two Powers, either (1) to avoid the exacerbation of hostile feeling threatening a rupture and a possible resort to force, or (2) with the object of restoring peace between belligerents who are thought likely to welcome an opportunity of laying down their arms and concluding an honourable peace. They may be offered and refused or accepted, or they may be asked and accorded. In any case the offer can only be made by, or accepted from, a neutral Power, and this should be a Power of whose friendly sentiments towards both parties there cannot be any doubt."

. . . . . .

"On the other hand," to quote Professor Oppenheim, "the mediator is the middleman who does take part in the negotiations. He makes certain proposals on the basis of which the States at variance may come to an understanding. He even conducts the negotiations himself, always anxious to reconcile the opposing claims and to appease the feeling of resentment between the parties. All the efforts of the mediator may often, of course, be useless, the differing parties being unable or unwilling to consent to an agreement. But, if an understanding is arrived at, the position of the mediator as a party to the negotiation, although not a participator in the difference, frequently becomes apparent either by the drafting of a special act of mediation, which is signed by the States at variance and the mediator, or by the fact that in the convention between the conflicting States, which stipulates the terms of their understanding, the mediator is mentioned."

It may be remarked that Appendix III, which contained a most useful selection of historical and biographical works of importance to members of the diplomatic service, has been extended and brought up to date, and now includes the principal works relating to the history of the Great War.

The lamented death on October 8, 1919, of Professor Oppenheim, the Whewell Professor of International Law in the University of Cambridge under whose editorship the first edition appeared, deprived this second edition of the advantage of his valuable supervision, but Sir Ernest Satow does not think that he would have disapproved of any of the alterations.

WAR AND TREATY LEGISLATION, 1914–1922.[1]

Mr. Armstrong has performed a most considerable achievement by this work, the second edition of which brings the material collected approximately up to date. Since the establishment of the Mixed Arbitral Tri-

[1] *War and Treaty Legislation*, 1914–1922. By J. W. Scobell Armstrong. Second Edition. (London: Hutchinson & Co. 1922.)

bunals in this country, English lawyers of both branches of the profession have of necessity had to concern themselves with a body of law to a large extent new. They have been confronted with problems arising out of the construction of the Treaties of Peace and the Orders and Departmental Regulations made under them, which deal with important questions of private rights. It was plainly impossible adequately to master such questions without a proper grasp and understanding of the legislation enacted during the war in the various enemy countries, which made provision for the disposition or control of enemy property. In this admirably judicious selection (which is very far from being a mere compilation) of such enactments and orders Mr. Armstrong leads us naturally up to the point at which enemy property is dealt with in the several Treaties of Peace. These are supplemented by all the Orders in Council carrying those treaties into effect, as well as by such subsidiary agreements between the Governments or their Clearing Offices as have been made in furtherance of the object of the treaties. Of especial value is the inclusion in this volume of the principal German and Austrian Enemy Property Legislation, and the opportunity thereby given for an appreciation of the practical method of control followed in those countries. All those who are interested in the effect of the treaties upon private contractual and property rights, and, in particular, those who are professionally more directly concerned in their interpretation, owe a large debt of gratitude to Mr. Armstrong for supplying an urgent need.

C. M. P.

THE INTERNATIONAL STATUS OF THE DOMINIONS.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

THE conclusion of the treaty of March 2, 1923, with the United States of America regarding the halibut fisheries in the Northern Pacific has raised once more in a definite form the question of the status of the self-governing Dominions of the Empire from the point of view of international law. The problem has already been widely discussed,[1] and it is natural that the new event should have been canvassed with the view of making it fit into one or other of the current theories of that status. Nor in fact is there any doubt as to the importance of the episode, though it is clear that the deductions to be drawn from it are by no means those which have been drawn in the Union of South Africa.

General Smuts's Theory.—It is to the Prime Minister of the Union that we owe the conception of the Dominions as possessed of an international status of a special kind, and the only consistent attempts to explain and justify that status. His view was most clearly expressed during the debate in September 1919 in the Union Parliament on the ratification of the treaty of peace with Germany, when he said : " The Union Parliament stands on exactly the same basis as the British House of Commons, which has no legislative power over the Union. . . . Where in the past British ministers could have acted for the Dominions in respect of foreign affairs, in future ministers of the Union will act for the Union. The change is a far-reaching one which will alter the whole basis of the British Empire. . . . We have received a position of absolute equality and freedom not only among the other States of the Empire, but among the other nations of the world." These words are perfectly explicit, and they are not effectively to be questioned by laying stress on the admission, which he made during the discussion

[1] M. Nathan, *Transactions of the Grotius Society*, viii, 117–32 ; M. M. Lewis, *British Year Book of International Law*, 1922–3, pp. 21–41 ; Keith, *War Government of the Dominions*, pp. 147–75 ; H. Rolin, *Revue de droit international*, 1923, pp. 195–226 ; T. Baty, *Canadian Law Times*, xli, 677–704.

of the issue, that the Union could not secede from the British Empire through the instrumentality of an act of the Union Parliament assented to by the King. This assertion may be interpreted, consistently with the earlier assertion of equality between the States of the Empire, by the view that the relation of the States within the Empire was one of indissoluble connexion as far as the Crown was concerned, so that the King could not constitutionally accept any unilateral effort to dissolve the bond of union. There is, of course, nothing in international law to render such a conception unacceptable ; it is perfectly possible to conceive of the British Empire as now composed of a number of autonomous States, each with dependencies, united by a common sovereign, none of the States having any right to repudiate the sovereign without the assent of the others. It would follow that there would be a real and fundamental change in the constitution of the Empire since the Armistice, and that no treaty arrangement could be entered into affecting any autonomous part of the Empire without the deliberate action of the Government of that part. A further deduction is that each autonomous part of the Empire is capable of exercising in independence of the other parts the treaty power as regards itself.

The Dominions and the Treaties of Peace.—This view is supported by General Smuts from the facts of the mode of concluding the treaty of peace, and the constitution of the League of Nations. It is, therefore, necessary to consider precisely what was effected in 1919 regarding the exercise of the treaty power, and to distinguish carefully between the international and the national aspects of what then occurred. In 1919 foreign countries were well aware of the complex character of the internal organization of the British Empire and the large amount of autonomy in economic questions enjoyed by the various self-governing territories. But up to 1912 the Empire had always appeared as a diplomatic unity. Canada, for instance, might wish to have a special commercial arrangement with France, and Canadian ministers might, as in 1907, negotiate the terms in Paris with French ministers, the British representative at Paris doing no more than introduce them to one another ; but, when it came to the signing of a treaty, the Canadian ministers, who signed along with the British representative, acted under precisely the same form of authority as did he, namely, full powers from the King, issued on the authority and responsibility of the Imperial Government. Doubtless that Government acted on the request of the Canadian Government, but for France that was a matter of

indifference from the theoretical point of view; nor was France concerned with the fact that the convention was only signed when the two Governments had agreed that the terms were satisfactory, and ratified on similar agreement being reached.

In 1912, however, a precedent [1] was created which passed at the time entirely unremarked. At the Radiotelegraphic Conference of that year the Dominions were represented separately from the United Kingdom by delegates who were accorded full powers by the King on the advice of the Imperial Government, acting on the request of the Dominion Governments, but whose authority was limited to action for the Dominion in question. Though it did not happen, one or more of the Dominions might have declined to accept the treaty arrived at, thus emphasizing the departure from the normal procedure. In 1914 the same plan was followed as regards the Convention on the safety of life at sea. In both these cases, however, the subject matter of the conventions was predominantly commercial, and the question how far the new method could be applied to political negotiations did not present itself. It was, however, inevitable that the point should be raised, and when the question of preparations for The Hague Conference arose in 1914, I suggested to Mr. L. Harcourt, then Secretary of State for the Colonies, that the Dominions should be represented at the Conference by special delegates separately accredited to represent the Dominions. The suggestion, in the absence of any Dominion initiative, came to nothing; but in 1916 I renewed it in the shape of recommending separate representation for the Dominions at the conference to settle peace.[2] The arguments for and against such a course were obviously complex, as can be judged from the facts of 1918–19, when Mr. Hughes, who desired separate representation, found himself in disagreement with his colleagues; but ultimately the views of Sir R. Borden and General Smuts prevailed, and distinct representation was conceded, on the ground that the Dominions could not be expected to accept a position of substantial inferiority to the lesser belligerent Powers which had done far less to win the war.

Effect of the Treaties of Peace.—But did that representation amount to the creation of new international units, placing the Dominions and India on the same international footing as Hanover, when it was under the British kings? It cannot, I think, be con-

[1] The case of the Universal Postal Union, sometimes cited in this connexion, is not a true parallel, for the representatives of various parts of the Empire, including Crown Colonies, are not given full powers by the Crown.

[2] See *Canadian Law Times*, xxxvi, 856 f.

tended successfully that this was the case. The treaty was signed by plenipotentiaries of the King of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, by some generally, and by others for the Dominions and India separately. The British Empire alone was named in the treaty as one of the principal allied and associated Powers, no mention being made of the Dominions or India separately among the minor Powers. Now internationally the essential point arises : would the whole Empire have been bound by the treaty, had the separate signatures for the Dominions not been appended ? If so, then the Empire remained an international unit, and the separate signatures for the Dominions and India were internationally unimportant. Nor can there be any doubt as to the fact that the Empire would have been bound by the general signatures alone ; contemporaneously a pact was signed regarding the defence of France, to which the Empire, France and the United States were parties ; there were no separate signatures, and it was necessary to exempt the Dominions expressly from the obligations of the treaty, unless the Dominion Parliaments chose to accept them. That the separate signatures, and the separate ratification resolutions passed by the Dominion Parliaments, were of the highest importance from the British constitutional point of view is obvious ; but internationally these matters are indifferent. The same result presents itself when it is considered how the plenipotentiaries were appointed. They held authority from their Governments to act, but they signed under international law, in virtue not of these authorities, but of full powers issued by the King on the advice of the Imperial Government, and it was on the authority of that Government that ratification was expressed.

The Dominions and the League.—In the League of Nations, on the other hand, the Dominions and India have actually received a measure of international personality alongside of the British Empire. They have separate votes ; they are eligible, however unlikely such an eventuality may be in fact, to be selected members of the Council, despite the permanent representation of the British Empire on that body. In all matters arising out of the League compact, they deal as independent units ; they hold mandates direct from, and report on them direct to, the League ; their representatives attend League meetings on the authority of their own Governments, not under powers granted on the advice of the Imperial Government. They are so independent that they do not mature their plans of action in concert, and they do not hesitate to vote against the views of

the Empire. Curious results may be deduced from the terms of the constitution of the League in their application to the Dominions and India, but it is needless to investigate this question; what is clear is that in respect of membership of the League the Dominions and India have a special status which may be justly termed international. But this status is confined to League matters, although the future alone can decide how far it extends, and a very difficult issue may be raised if the Irish Free State insists on inviting League intervention on the subject of the boundary with Northern Ireland under the treaty with Great Britain of December 6, 1921.

The Washington Treaties.—It is true that in the case of the Washington negotiations and treaties of 1921–2 the claim has been made by General Smuts [1] that the position acquired by the Dominions as distinct parts of the Empire, which could be bound only by contracts entered into by their own plenipotentiaries, was recognized by the United States. It is, however, quite impossible to accept General Smuts's opinion of the facts. The essential point is that the United States addressed a request to be represented to the Imperial Government alone, and pointedly stated that no other procedure was possible, as the Dominions had no diplomatic representatives at Washington and the United States maintained no diplomatic relations with their Governments. In the second place, all the representatives of the Crown were provided with full powers from the King issued on the advice of the Imperial Government, the Union itself being represented by Mr. Balfour, who signed both generally and separately for South Africa. Similarly ratification was signified by the King on the advice of the Imperial Government. If the representative of any Dominion had declined to sign, the treaty would none the less have bound the Empire as a whole, unless the British negotiators had induced the United States and the other Powers to accept a clause in the convention excluding part of the Empire from its operation. From the point of view of the internal arrangements of the Empire the new mode of negotiation and signature and ratification is important, but it has as yet no international significance, and the view of General Smuts is explicitly and effectively dismissed by the express testimony of the New Zealand representative [1] who took part in the negotiations, and who, as a jurist of high repute, claims even greater authority.

[1] Union House of Assembly, July 18, 1922, May 21, 1923. Contrast General Hertzog, May 18, 1923. General Smuts's later statement proves clearly that no change took place in the attitude of the United States.

The Fisheries Treaty.—There remains, therefore, only the case of the treaty of March 2, 1923, as a proof of the international status of the Dominions. The view of that treaty taken in South Africa is admirably expressed by the *Cape Times* in its issue of March 28; it assumes that the treaty was directly concluded between Canada and the United States, Canada declining to agree to the signature of the British ambassador at Washington being appended to the treaty in token of its imperial character, although the convention excluded all British subjects from taking part in the halibut fisheries in the open seas off the Pacific coasts of Canada and the United States. It admits that anxiety has been felt on this account, but regards this as due to the conception of the British Commonwealth as still being a "body politic. It is no longer a body politic, but a partnership of States with one monarch who is advised by his ministers in each of the component States of the partnership. The possibility of conflicting advice being given by ministers in Great Britain and a Dominion, or by ministers in one or more Dominions, exists. But it is a possibility whose risks can be reduced to a minimum by mutual consultation and forbearance in the interests of the whole partnership. And its risks are almost negligible in comparison with the risks which would be involved in any attempt to reassert that the treaty-making power of the Dominions must always be subject to the explicit endorsement of British ministers, or that advice which his ministers in any Dominion may think fit to tender to the sovereign must be tendered through and be endorsed by the Cabinet of the moment in Downing Street." This is clearly a precise statement of the implications of General Smuts's views, but it has no relation to the facts of the case, which were at that time little understood even in Canada itself. The facts are that the terms of the treaty were duly negotiated through the British ambassador at Washington between the United States and Canadian Governments with the full approval and knowledge of the Imperial Government, and that the conclusion of the treaty by formal signature was only approved by the two Governments of the Empire after full consideration. The Imperial Government then secured the issue by the King of formal full powers to the Canadian Minister of Marine and Fisheries to sign the treaty, not for Canada, but simply generally. Had the treaty been signed, as usual heretofore by the British ambassador and the minister conjointly, there would have been no innovation of any kind. The omission of the ambas-

[1] See Sir J. Salmond's report, *New Zealand Official Year-book*, 1923, pp. 629–31.

sador's signature was an interesting change; it did not in the slightest degree alter the international character of the instrument; the Senate of the United States, in its ratification of the treaty, made it clear that it recognized that the treaty was one concluded for the whole Empire, and binding all British subjects.

The reason why the ambassador's signature was not desired by the Canadian Government is simple. It has long been felt by Canada that, in view of her special relations to the United States, she should have a diplomatic agent at Washington who would conduct Canadian business with the United States, while the ambassador would deal with other business. The principle was conceded to Sir R. Borden in 1920 when, according to the notification then agreed upon, it was insisted that the Canadian representative would be accredited by the King in the ordinary manner, would act in the ambassador's absence in his place, and that his appointment would in no way interfere with the principle of the diplomatic unity of the British Empire. Thus the Canadian representative could only conclude a treaty with the assent of the Imperial Government, and equally such a treaty, however exclusively it might interest Canada alone, could only be ratified with like assent. The parallel between the position thus contemplated and that of the Canadian minister's signature of the halibut fisheries treaty is obvious and striking, and it explains adequately the desire of the Canadian Government to omit the ambassadorial signature, which would not have been required, had the arrangement for a representative of Canada at Washington been made effective by the appointment of a Canadian to fill the post agreed upon. In other cases Canada has not hesitated to accept ambassadorial signatures; thus the new treaty of 1922 with France was signed by the British ambassador at Paris jointly with two Canadian ministers. Nor have Dominion signatures been deemed necessary or desirable for the renewal of the arbitration treaty with the United States effected in June 1923, so far is it from being the case that the Dominions can be bound only by signatures of their own representatives.

Conclusions.—That internationally, apart from League of Nations proceedings, the Dominions have no status apart from the Empire appears clear. Moreover, it seems eminently reasonable that, as regards treaty relations, the Imperial Government should have a voice to the extent at least of being able to force delay in concluding any treaty proper, until it has been considered in detail by an Imperial Conference. For a treaty binds the Crown, and the Imperial

Government is bound to take steps to have it carried out, on pain, in the event of refusal to do so, of the possibility of recourse to arbitration or even to war. If a foreign Power does not desire the assurance of a treaty proper, it may, of course, enter into an informal agreement with a Dominion, which needs no approval by the Imperial Government, and equally throws no obligation on that Government to see that its terms are fulfilled. But naturally enough such agreements are not specially attractive to foreign Powers.[1]

It may, of course, be asked whether it would not be better frankly to admit that the Dominions have the treaty power and are States of international law, linked by a personal union, but with the right of independent action. The most convincing answer is that, in their present state of development, the Dominions are not prepared to take the step which logically should follow, the establishment of separate diplomatic relations with other Powers, nor to maintain the armed forces necessary to defend their independence, and that they recognize, more or less clearly, that, if Great Britain must bear the burden of diplomatic establishments and of Empire defence from external attack, she may fairly claim the right to be consulted in any treaty negotiations, while in the Imperial Conference there exists adequate security that the Imperial Government will never interpose objections to treaties desired by the Dominions save on grounds which she can make good. This seems in effect the attitude of Australia and New Zealand, while Canada's special needs seem met by the right to appoint a Canadian representative to Washington. General Smuts's position is due to the need of meeting the opposition demand for complete independence by stressing the real measure of autonomy attained under the existing system. In the case of the Irish Free State the difficulty of conceding the treaty power would be much more considerable than in the case of the Dominions; but under the treaty of peace, if the power is conceded to a Dominion, it must be admitted to belong to the Free State, especially since her admission on September 10, 1923, to the League of Nations.

[1] The arrangement of the Transvaal with Mozambique of April 1, 1909, was not a treaty, but an agreement between two colonial governments, and such also is the character of the renewal of Part I of that convention by agreement of March 31, 1923 between the Governments of Mozambique and the Union of South Africa, though in Parliamentary Paper, Cmd. 1888, it is erroneously described as an agreement between His Majesty's Government and the Portuguese Government.

THE FUNCTION OF LAW IN SOCIETY.[1]

[*Contributed by* EDWARD JENKS, ESQ., D.C.L.]

THE word " Law " is used in many senses ; and a lawyer, though he may have succeeded (with the acquisitiveness so readily attributed to his craft) in annexing it as his peculiar possession, is certainly not entitled to any monopoly of the subject.

Some half-century ago, for example, the great naturalist Huxley indignantly repudiated the alleged attempt of the legal profession to monopolize the term, and contrasted, somewhat scornfully, the " law " which emanated from the mouth of the ruler or the judge—its vacillations, its inequalities, its crude generalizations—with the majestic laws of the physical universe, existing unchanged from time immemorial, perfect in their operation, unbreakable in their irresistible might, perfect in their harmony. He was right ; and a similar claim might be made—is in fact made—by the theologian, the psychologist, the economist, the mathematician, and the geologist.

This is instructive ; because a very slight acquaintance with the history of language suggests that at the back of apparently inconsistent uses of the same word, there is usually to be found an identity of essentials which at least hints at a common origin of all. And it is not, perhaps, without significance in this connexion that one of the most difficult questions in jurisprudence, viz. the definition of insanity, should at the present time be the subject of rival claims by the jurist and the physician.

It is true that, among human faculties, invention is rarer than imitation, and that, in undeveloped man at least, the tendency to appropriate the work of others is more attractive than working to satisfy one's own needs. Yet so closely is the growth of language —an almost unconscious process—bound up with the growth of ideas, that (save in a very few cases) it is only a matter of patience and observation to separate the essential from the accidental in the apparently inconsistent uses of a common word.

[1] Paper read before the Sociological Society, June 26, 1923.

Rejecting, then, the elements in the word "Law" which are, obviously, special to particular uses of it—the element of direct inspiration in the laws of the theologian, the rational consistency in those of the mathematician, the inevitability in those of the geologist—we seem to find that every use of the word "law" implies two elements: (*a*) compulsion, (*b*) order. The word "law" in English and kindred languages is said to be more closely associated with the former. What is "lawed" is that which is placed, bound, or fixed, either so that it cannot change its position, or so at least that it can only do so on pain of correction. In the laws of the physical universe the inability is complete. If it is found that an alleged "law" of the physical world does not operate, the scientist does not say that the law has been disobeyed. He says that it does not exist—that there has been a mistaken inference. In the case of laws which are imposed by the exercise of the human will, there is, clearly, no such accuracy. Indeed, by the average man, such laws are recognized as being frequently broken, and, in many cases, are only discovered to exist because they are broken. Still, it is the general doctrine of jurists that there can be no true law (even in their sense) without a "sanction"—some penalty or adhibition which makes the breaking of a law an unpleasant thing for the breaker. And it is somewhat suggestive that the actual word "law" is said to have become familiar in this country with the Danish invasions of the tenth and eleventh centuries, and the severely repressive regime which the conquerors established; the older English synonym (now reserved for other purposes)—the word "right" ("folc-rīt")—being significantly superseded by the word of foreign origin.

The other essential element in the notion or idea of law is the idea of "order"—not, of course, in its purely arbitrary or technical meaning of absence of physical violence (though that special meaning has its own interest), but in the sense of symmetry or harmony. We are probably correct in supposing that this element, now so comprehensive, and, therefore, so hard to define, was in its origin physical—that, to the eye of primitive Man, there is something fascinating in the appearance of certainty or uniformity, in ever so simple a degree. The difference between a mob of wild cattle rushing heedlessly in all directions, and a file of horses or camels proceeding in regular succession, can hardly have failed to appeal to the rudimentary mind, long before the practical utility of the latter arrangement was perceived. We read in the instincts of

children similar tendencies and admirations : the popularity of the methodical procession of the animals towards the Ark, the symmetrical disappearance of each of the Ten Little Niggers. The progress of physical science has, of course, enormously strengthened the ethical aspect of this element, which is expressed in English by the word " right," a word which, as I have hinted, appears to have been the earliest English term for what we now call " law," and which, in many kindred languages, is still undistinguishable from that idea. Where an Englishman now speaks of " English law," a Frenchman will speak of " Droit français," a German of " Deutsches Recht," an Italian of " Diritto Italiano," and the like. A very curious extension of the idea is found in such phrases as " right angle" and "straight conduct," where the notion of symmetry as an ideal is clear, though not very easy to analyse. And it is, I think, not merely an accident that while the root-idea of " right " is what we call " straight," that of wrong is what is " twisted," as appears in the widespread use of the word " tort," as an equivalent for legal wrong, in the languages of Western Europe.

It is, beyond question, again clear, that it is in the material universe that these two elements of compulsion and order are most perfectly united—that they are, in fact, inseparable. Hence the attitude towards his subject of the student of that universe. His science consists in discovering its laws ; his art in adapting human conduct to them. It would, I suppose, be a perfectly arguable proposition, that if Man thoroughly understood and conformed to the laws of the physical universe—say on the subject of physical health—all illness, and, therewith, much of the evil in the world, would disappear. The trouble is : that, even if these laws were perfectly understood, many people would not conform to them—for example, that if the laws of nutrition were absolutely known, many people would still violate them, and suffer from indigestion. That would not, perhaps, matter so much, if mankind were composed of isolated individuals. It happens, however, that Man is a social animal, at least in the sense that he lives in groups, and that his indigestion and other ills react powerfully on his neighbours.

Thus we come to the boundary-line which distinguishes the law of the jurist from the laws of the material universe. Briefly put, that law is, historically, and, still, in the main, actually, an attempt to prevent the individual encroaching on the interests of his fellows, or, to put it in another way, its object is the regulation of social conduct. The theologian and the moralist deal with Man

as an individual; the lawgiver and the judge as a member of a social group. Can we suggest the scope of their functions?

It is, I think, an interesting fact to note that, so far as our knowledge of primitive society goes, there seems to be little doubt that, of the two elements which seem to be the root elements in law, it is the idea of compulsion which first attracts the mind of primitive Man. Also, to note that, in his belief, the compulsion is applied by non-human forces. No doubt, with his imperfect imagination, primitive Man attributes to those forces actions and feelings which he knows by experience to exist among his fellow-men. That is, of course, simple anthropomorphism—Man made God in his own image. The lightning strikes the tree, the flood washes away the hut. These are the acts of an offended Power. What has caused them? Obviously some offence has been given. What is it? Some act, probably quite irrelevant, is fixed upon; hence the system of "taboos," which are the first elements of a criminal code.

Thus the social element comes in. The anger of the Unseen Powers is irresistible. Also it is apt to be indiscriminate. The victims of a tornado or a pestilence may have done no act to which the disaster can be attributed. But among the survivors may be one whose conduct has been suspicious, who has violated a "taboo." If he cannot be at once identified, he may be found by the soothsayer or wise man, or by the drawing of lots, which is, probably, an appeal to the offended Power himself to denounce the offender. Here are the elements of prosecution and trial, in their rudimentary stages. It is quite easy to trace the succession of changes which has developed them into the formal trial of the present day. The Christian Church in Western Europe took over the conduct of ordeals as the most natural thing in the world; though, to her credit, she abandoned it in the early thirteenth century. It is less than 300 years since the last witch was tried in England by the water ordeal; in southern Europe such things are still done. It would ill become me to speak disrespectfully of trial by jury. But I sometimes think that leaving the question of the prisoner's guilt in a doubtful case to that tribunal is not very far removed from the ancient ordeal by lot.

In communities which we call "progressive," the ancient system of taboos is in time supplemented by a more positive code, in which "Thou shalt" takes its place beside "Thou shalt not." Due historically to the increased application of intelligence to industry of all kinds, as the gradually extending control of Man over material

resources leads to the appearance of the economic arts—sheep and cattle rearing, agriculture, and simple handicrafts—this aspect of law becomes more and more prominent.

It is commonly accepted that this development of economic life is intimately associated with a change in the organization of society, from the loose hunting or totem group, based on propinquity or primitive religion, to what may be broadly called patriarchal institutions, under which the economic, religious, and family relations are only different aspects of the same bond, based ultimately on kinship, real or fictitious, through males. In the earlier stages of this change, the type may be said to be personal and autocratic ; but, after a time, the single pastoral household expands into a class or tribe of closely inter-related families, living under a tradition both religious and economic, which, with the establishment of fixed agricultural settlement, becomes the " custom of the country." I am not going to stir the fiercely debated question, how far the self-supporting village of medieval Europe, India, or China, was a " communal " or " communistic " group. My object here is merely to emphasize the new importance of the positive aspect of law—the belief that law is no longer merely a series of inhibitions (" Thou shalt not "), but, much more, a series of positive commands (" Thou shalt "), the object of which is to ensure the continuance of a certain economic, religious, and social *order*, believed to be essential to the welfare of the group. The main object is no longer to avoid certain disastrous visitations by revengeful Powers ; though, needless to say, abundant traces of the older ideas survive. It is, rather, to maintain a course of life which is believed to be productive of positive good. And, though this order is still deemed to rest on superhuman authority, that authority is no longer of absolutely unknown, incalculable, and mainly malignant Powers, but of persons believed by tradition to have once been human, and to have passed, by the portal of death, into the " Alcheringa " or Spirit Land, while their ghosts still haunt the dreams of their descendants. If revolt against this order is conceived of as possible, it is met with the simple expedient of outlawry or banishment from the group, admission to which is, necessarily, barred to all except those entitled to membership by kinship real or fictitious. This is the stage of Ancestor-worship.

So essential is this scheme of things deemed to be, that it is extended, though with increasing difficulty, to the new groups which are thrown up by the yet further development of economic progress.

The craft-gild and the merchant-league are essentially of this type. The rules of these bodies are, perhaps, more clearly recognized as of human origin than the immemorial custom of the village. Enrolment in the gild or league through apprenticeship to a full member is, obviously, not quite the same thing as birth in a village household, though it is not very different from adoption, which is fictitious kinship. The patron saint is not, perhaps, believed to be the physical progenitor of the members of the gild or league; and the elder men or "aldermen" of the gild are not quite the same thing as the village elders, who are, in a physical sense, everyone's uncles. But the sequence of ideas is clearly the same—that observance of certain practices will produce positive good, that the bonds of society include only those who will observe them, that the test of their validity is that they have "worked" from time immemorial.

No one can fail to see the weakness of such a type of society. It ignores the fundamental fact of the individual intelligence, the restless mind which is constantly making new discoveries in which the average man is not interested, which he refuses to take account of in his way of life. Further than that, by adopting a fixed, in the place of a nomadic scheme of life, the new society offered itself as a tempting prey to enterprise.

This was the situation which led, in what we call the "Middle Ages," to the establishment of the modern State, with its autocratic authority and its insistence on the ultimate verdict of military force. Historically, the same thing had happened in an earlier epoch, when the Roman armies conquered the then known world and established their autocratic Empire. After the fall of that Empire, the process began again; and though, this time, no world-State succeeded in repeating the achievements of Rome, the States of modern Europe, at least, are definitely of similar origin. Either they are the outcome of successful and organized conquest by an invading host, or they owe their origin to the emergence, within an ancient society of the patriarchal type, of a ruler whose power rests upon a military organization which has secured control of the ancient economic and industrial communities. Until the Swiss Bund of 1308, there is no instance since the fall of the Roman Empire of any other way of creating a permanent State. The doctrine of State-sovereignty is simply the translation into political terms of the military doctrine of the supremacy of force. It may be used wisely or unwisely, benevolently or cruelly; but its character is essentially the same, and it is wholly different from the older system

which it displaced as the custodian of law. It is, of course, admirably fitted to apply the inhibitive or negative side of law; and a well-known school of political thinkers has maintained, with much plausibility, that it is with this aspect of affairs alone that the State is, by its nature, qualified to deal. Be this as it may, it is an obvious fact that, in modern communities, "Law," in the sense of the jurist, has come to mean, to all intents and purposes, a rule of conduct enforced by the State.

There is, therefore, a very real meaning in the antithesis expressed by the phrase: The State and Society; and I distrust profoundly any attempt to treat the two as different aspects of the same thing. In some happier age, when the harmony of what appear at present to be irreconcilable forces and methods has been secured by means as yet undiscovered, this antithesis may well disappear. At present it seems best to recognize it, and treat it philosophically. Both institutions belong to humanity; both appear to be inevitable, if not essential, in certain stages of human development. Much has been done, in some countries, to harmonize them—notably in Western Europe by what is known as "representative government" and the adoption of the principle of the majority vote. But there is a danger, in the very success of devices of that kind, that real and essential limitations may be overlooked. No serious person can believe that the vote of a majority can alter the fundamental conditions of the universe. These can only be ascertained, not affected, by the progress of knowledge. And the way to ascertain them is by observation and experiment, not by inhibition. The great virtue of the majority principle, strange as it may sound to say so, is that it has, historically speaking, promoted tolerance; and tolerance is as essential for the working of the social spirit as for the achievements of individual enterprise. In its origin a recognition of the supremacy of physical force, the very fact of the acceptance of majority rule has, in countless instances, prevented an appeal to force, perhaps because reasonable men have perceived that, given time, the views of a majority can be altered by other means. It is the modern version of the "truce of God," with which the Church in old days strove to mitigate the evils of anarchy. The surprising thing is, that this principle, of unknown though clearly modern origin, has extended from political, that is to say, military institutions, to those of a purely social type, and that it is found indispensable to the working of a vast number of economic, religious, and even educational enterprises.

Putting together these fragments, it occurs to me that there is just one suggestion which I may venture to make towards a solution of the problem posed by the title of this paper. We find a social force which has, apparently, been working since the dawn of history in two directions—compulsion and order. In some mysterious way, which I am not sufficient of a psychologist to understand, this process has resulted in the generation of a tendency which, for want of a better name, I call "continuity." Unlike the elements of compulsion and order, it does not appear to have been an original element in the idea of Law. But it is not, I think, an exaggeration to say, that jurists now regard it as almost inseparable from the notion of law in its modern sense. We do not, in fact, lawyers or laymen, think or speak of isolated commands or expedients as "laws." We regard it as one of the tests of a "law," that it enables us to predict, with varying degrees of certainty, the sequence of future events. If there be anything in this view, we may perhaps regard law as the social memory, the nerve of consciousness which links one generation to another in the same society, and carries on the tradition of social life. I am not sure that this is true of all legal systems, especially modern legal systems. But in a system like our own, where precedent contributes even more than legislation to the structure of the legal body, there does seem to be some ground for thinking that we may here be on the right line of search.

If this be so, it may not be immaterial to reflect, that the great work of the illustrious roll of English judges, stretching from the thirteenth century to the twentieth, has played a part in cementing the fabric of English social life the importance of which is not always sufficiently realized. For it is the peculiar characteristic of the English system, and of systems derived from it, that the judges, though historically and technically the servants of the State, and bound to enforce its commands, have, almost from the first, also played the important part of educating the community in the ethics of social conduct. And in that part they have drawn their inspiration, not from abstract and, possibly, unpractical ideals, but, by an almost imperceptible process of attraction and development, from the solutions arrived at by the better members of the community of the many problems of practical life. This is, I think, the inward meaning of their frequent appeals to the example of the "reasonable man," that favourite objective standard of the English judge. With unwearying patience, ingenuity, and unsparing labour, our Judges have, if I may so put it, woven into the national,

that is, the political, life of the community that instinct of justice, that respect for ethical considerations, which, if it be not presumptuous for an Englishman to say so, is one of the most conspicuous as well as one of the most honourable and abiding features of the English character. I know, of course, that a definition of "Justice" is a task which has baffled the wisest; but it is a task which no student of society can shirk. For the difference between a mere crowd and a society is just the difference between body and spirit; and Justice, whatever else it may be, is a spiritual force without which no society can live. And as a mere crowd is converted into a society by the pursuit of a common aim, so the Law, by directing the energies of mankind towards the pursuit of Justice, has before it the ideal of welding mankind into a great and noble society. That is the historic function of Law in building up Society.

FRENCH LAW ON TAXATION OF BETTING.

[*Contributed by* O. E. Bodington, Esq.]

French legislation on the taxation of betting has a wider interest than that derived from its obvious fiscal advantages. The law of June 2, 1891, not only gave legislative approval to the Pari Mutuel under the restrictions imposed by that law, but also defined in simple language the limits of lawful and unlawful betting in so far as horse-racing is concerned. Thus a controversy fostered by a whole jumble of contradictory judicial decisions was finally set at rest. It is a significant coincidence that the Pari Mutuel was originally condemned as unlawful both by the English and the French Courts at about the same period: in the English High Court in the case of *Tollett* v. *Thomas* (1871, 6. Q.B. p. 514), and in the French Courts in the case of Oller (Court of Appeal of Paris, December 31, 1874; and Court of Cassation, June 18, 1875; *Dalloz*, 1875, ii, p. 92, and i, p. 445). We get little enlightenment from either of these decisions on the ethical view of the question taken at that time by the judiciary of either country. On a close reading of Lord Chief Justice Cockburn's judgment, in the former case, it is impossible to resist the conclusion that the real issue, which he himself defines as being whether horse-racing is a "game of chance," was skilfully avoided in his judgment, and that, despite his protest to the contrary, the decision was largely influenced by the fact that the Pari Mutuel machine which was used in that particular instance was an "instrument of wagering" within the Statute. In the Oller case the Court of Cassation, which had so often changed its opinion both as to the validity of individual betting, book betting, and Pari Mutuel in previous instances, in this case, while incidentally recognizing the validity of individual bets, condemned all betting which had not for its obvious object the improvement of horse breeding, but rather the stimulation of the gaming propensity in human nature and individual profit to the stimulator. It is conceivable, indeed, that if Oller had confined his operations to the actual race-course and had refrained from

opening an office on the Boulevard, as he did, the decision might have been otherwise. He was amply compensated later on for this untoward incident of his early career; for when the Government was preparing its Pari Mutuel scheme in 1891 it sought the assistance of Mr. Oller, who originally introduced the Pari Mutuel system into France, and he was for long years connected with its management. He rose, indeed, to a position of high standing in the racing and theatrical world in Paris, and died only recently at a ripe old age.

The question from the standpoint of the legislator of England to-day, as from the standpoint of the legislator in France in 1891, is identical. No statesman can refuse to recognize that the passion for gaming is a human instinct which it is impossible by legislative action to repress, but which can be regulated by such action. This being so, is the legislator justified in regulating this instinct in a manner which can, as French results show, be made so immensely lucrative for the national exchequer? The French Government of that day grasped the nettle with great determination, but did not immediately gain its ends. It is significant to recall that their original measure met with serious opposition from the Chamber of Deputies. Prior to the promulgation of this law the legislature had been greatly disturbed by the abuses prevailing on and off race-courses in connexion with racing. Decrees had been voted authorizing race-course societies to organize the Pari Mutuel on their race-courses but forbidding any organization off the course. The enormous profits realized by these societies under these decrees attracted the attention of the Government to the fiscal possibilities of the Pari Mutuel. A comprehensive Government measure was therefore brought before the Chamber of Deputies early in 1891 for the regulation of betting and the working of the Pari Mutuel. The majority of the Chamber, when this measure was laid before it on February 28, 1891, took alarm, seeing in it a kind of legislative approval of gaming. A heated discussion ensued, during which M. Constans, the energetic Minister of the Interior, said that he would take upon himself to stop every public manifestation of gaming if the law were rejected. Notwithstanding this threat, the Chamber refused to discuss the separate articles of the law; therefore, a few days after, the Minister was as good as his word, and had every external sign of betting removed from all race-courses, the only betting permitted being the individual and direct time betting—that is to say, *pari au livre*, or book betting, without the concomitant exchange of either money or tickets.

The result of this decree was, of course, disastrous. Race-courses were deserted by the public, gate-money dropped by 50 per cent., the whole horse-breeding community took alarm, and, finally, no later than May 14 of the same year a new Bill was brought forward which, after amendment, became the fundamental law on the subject of June 2, 1891. The provisions of this law are simple and concise.

1. No race-course is to be opened without the previous authority of the Minister of Agriculture.

2. No horse-races to be authorized other than those which have for their exclusive aim the improvement of horse-breeding, and which are organized by societies, the statutes of which are approved by the Minister of Agriculture.

3. The annual budget and accounts of all such racing societies are submitted to the approval and control of the Ministers of Agriculture and Finance.

4. Whoever shall carry on betting on horse-races in any place and under any form whatsoever by offering to *all comers* to bet or by betting with *all comers* either directly or through an intermediary shall be subject to the penalties set forth in art. 410 of the Penal Code.

These penalties are those applicable to people exploiting gaming houses and involve imprisonment of from two to six months and a fine ranging between 100 and 6,000 francs.

The following persons are deemed to be accessories to the above offence and punished as such :

1. Whoever shall have acted as intermediary for the bets in question or shall have previously received the stakes on deposit.

2. Whoever shall have sold information as to the chances of the horses engaged in view of bets to be made.

3. Every owner or manager of a public establishment who shall have allowed betting to be carried on in his establishment.

Lastly, societies fulfilling the above conditions may organize the Pari Mutuel on their race-course exclusively by virtue of a special authority of the Minister of Agriculture which is at all times revocable and subject to a fixed reduction for the benefit of local benevolent institutions and horse-breeding.

This analysis of the text is seen to bear out the statement made at the outset that the law has as its primary object the definition of what is lawful and unlawful betting and only incidentally institutes the Pari Mutuel as a strictly regulated outlet for the irrepressible passion.

The working and details of the Pari Mutuel have formed the object of a series of decrees and laws voted since the original law in which in particular the various deductions have been from time to time increased. The results to the French exchequer have been, as was anticipated, immensely lucrative, the total aggregate amounts earned by the Pari Mutuel having risen from 102,510,528 francs in 1891 to 1,090,103,945 francs in 1922. The table of the various deductions at present in force is as follows :

State Taxes.	Paris Meetings. Per cent.	Provincial Meetings. Per cent.
In aid of breeding	1·50	1·50
In aid of charity	3	2
In aid of communal drinking water supply	2	—
In aid of agricultural education	0·50	0·50
Expenses of management	4	7
	11	11

The proceeds of unpaid tickets are devoted to the formation of a benevolent fund for the benefit of the stable staff.

To resume : Under the present legislation in force in France since 1891 the only public form of betting on horse-races which is authorized is that of the Pari Mutuel, and this can only be lawfully carried on upon the race-course itself.

Individual betting is still perfectly valid ; so also is, for example, a club sweepstake, because neither of these forms of betting correspond to the offer to " all comers " forbidden by Article 4 of the law, nor are they organized in a " public establishment." Possibly the chasseurs in restaurants and café waiters who notoriously make considerable money by betting operations come rather close to the limits of legality ; but their defence would be that they do not deal with " all comers," but only with recognized customers of their establishment.

It will be observed that the provisions of the law rule out the bookmaker, and while substantially comprising the provisions of the English Betting Act of 1853 and our various subsequent enactments appear to provide a well-regulated outlet for the gaming instinct. At all events, while the policy of governmental control of betting is obviously open to controversy on ethical grounds, it is indisputable that in France it has put an end to a system of widespread and intolerable abuse and immorality, and it is now, to all appearance, so grounded in the institutions of the country that it is unlikely that it will ever be fundamentally altered.

THE ABROGATION OF THE TURKISH CAPITULATIONS.

[*Contributed by* NORMAN BENTWICH, ESQ., M.C.]

THE April number of the *American Journal of International Law* contains an extremely informing article upon the question of the abrogation of the capitulations of the Ottoman Empire, written by Mr. Lucius Thayer, who has had personal knowledge of the working of the capitulations while engaged in relief work in Anatolia. It may be interesting to the readers of this journal to summarize its contents in the light of the later developments of the Lausanne Conference.

Mr. Thayer shows that the principles of the capitulations are not peculiar to the arrangements made between the Ottoman Empire and the Christian Powers in the latter part of the Middle Ages, but are a perpetuation of legal conceptions of the later Roman Empire, by which the law concerning certain matters was held to be personal and not territorial, and the individual carried his law with him wherever he went. Thus, the Byzantine Emperors negotiated treaties with certain of the mercantile city-states, by which the subjects of those cities abroad were to be tried in accordance with the laws of their own country. Consuls were originally magistrates appointed by such city-states to try their citizens living in foreign parts; and both in England and the Netherlands, Italian consuls with judicial functions were to be found between the tenth and fifteenth centuries.

When the Ottomans captured Constantinople in 1453 they found in existence the system of conceding immunities of jurisdiction to foreigners; and merely followed the practice of the Christian Emperors in the granting of the capitulations. No doubt the exclusive character of the Moslem law conduced to the extension of the system; but, in origin, the capitulations were not an exceptional privilege granted to foreigners, but the amplification of a normal procedure. What is peculiar in the system is its survival to the present day, when jurisdiction throughout Europe has become territorial.

Since the Ottoman Empire was admitted into the family of nations by the Treaty of Paris in 1856, her rulers have constantly pressed for the abrogation of the capitulations, which have come to be, in practice if not in theory, a serious derogation from their sovereignty. It was only, however, after the Young Turkish revolution at the beginning of the twentieth century that they obtained the consent of some of the European Powers to a modification of the established regime. They had, indeed, taken steps, a year or two before the outbreak of war, to reform their whole judicial system with a view to a general modification of the rights of foreign subjects in judicial matters. The reforms had not been completed when the war broke out; but, before Turkey herself entered the conflict, she notified the foreign embassies in September 1914 that the capitulations would be considered abrogated from October 1 of that year. The representatives of all the Powers except the United States (which took separate action) joined in an identical note of protest against this declaration. As Mr. Thayer points out, the joint action of the ministers of the belligerents is interesting in view of the doctrine commonly held that belligerent Powers have no legal relations.

During the course of the war Germany and Austria entered into treaties with their ally, which provided for the complete abrogation of their capitulatory rights, and for the substitution of a special judicial regime on a reciprocal basis. The Powers of the Entente and the United States, on the other hand, have steadfastly maintained that the action of the Turkish Government in 1914 was null and void, that the capitulations could only be abrogated or modified by agreement between them and the Porte, and that, until fresh treaties are made, all their conventional rights must be maintained intact. They have, in fact, re-established consular Courts at Constantinople and other places since the Armistice with Turkey which function in accordance with the jurisdiction possessed at the outbreak of war.

The present extent of the judicial capitulations is as follows: In criminal cases where a foreign subject is accused, his consul has jurisdiction, although, if the victim of the offence is an Ottoman subject, the Ottoman Courts also have jurisdiction, provided that a representative of the consul is present at the trial. It had been the practice before the war to allow the Ottoman Courts to try cases in which a British subject was accused; but the right of the consular court to " evocate " such a case was asserted in a decision

of Judge Grain in 1912 in the case of *Rex* v. *Lawson*. In civil actions, where foreigners of the same nationality are involved, the consular Courts have absolute jurisdiction unless the suit concerns immovable property, in which case the Ottoman Courts alone can try the suit. In civil actions between foreign subjects of different nationalities, the consular Court of the defendant originally assumed jurisdiction, although the capitulations did not expressly confer it. In recent times, however, mixed tribunals containing both Ottoman and foreign judges have been instituted for the trial of such suits. In civil actions between foreign and Ottoman subjects the Ottoman tribunals exercise jurisdiction, subject to the presence of a representative of the consulate of the foreign subject concerned. Prior to the war a Court was established at Constantinople composed of three Turkish judges and two foreign assessors of the defendant's nationality to hear mixed cases on appeal from the local Courts, and to deal as a Court of First Instance with commercial suits between Ottoman subjects and foreigners. This Court has been replaced since the Armistice by a Provisional Mixed Judicial Commission consisting of three judges, of whom the President is a Turk.

Apart from the provisions as to jurisdiction, the capitulations contain clauses guaranteeing the inviolability of the domicile of the foreign subject, which cannot be entered by a local authority till after notification is made to his consul. They contain, moreover, provisions exempting foreigners from all the taxes levied by the Government, except customs and excise duties, of which the maximum amount must be agreed with the foreign Powers. Foreign subjects, however, can hold immovable property in Turkey only on the condition of being subject to all the legal imposts on land.

It will be readily appreciated that the capitulations in their present development constitute a serious limitation of the sovereign powers of the local Government. The British authorities in Egypt, in which country these rights of foreigners had prior to 1883 become established in their fullest extent, have found them continually a most embarrassing impediment to fiscal, social, and legal reform. The establishment of the Mixed Courts in Egypt, shortly before the British occupation, with exclusive jurisdiction in all civil cases between foreign subjects of different nationalities, and in certain criminal cases in which foreign subjects are accused, has afforded some amelioration; but, nevertheless, a legal system in which (*a*) a foreign subject, when charged with any serious criminal

offence, cannot be tried by the Courts of the country but is subject to the jurisdiction of his consul, and (*b*) any civil action in which a foreigner is concerned is assigned to a special kind of tribunal, is bound to hamper the even administration of justice. It is easy, then, to understand that the Turkish Nationalists have chafed at the reinstatement of the regime, and have laid it down at the Angora Assembly that they oppose all juridical and financial restrictions of any nature which would arrest their national development.

In the abortive Treaty of Sèvres between the Allied Powers and Turkey which was signed in 1920, it was indeed provided that the capitulatory regime should be maintained in what was left of the Ottoman Empire; but the representatives of the Allies at the Lausanne Conference have recognized that the continued discrimination in favour of foreigners is incompatible with present conditions. It has been proposed, therefore, in the new draft treaty to cancel the judicial as well as the fiscal clauses of the Capitulations; and to draw up a convention defining foreigners' rights and obligations in Turkey, as regards settlement, taxation, the recognition of individual and moral persons in the Courts, and the jurisdiction of the Courts, in accordance with the general principles of public law. The Allied representatives have, however, urged that it must take some time before the law and the administration of justice in the Turkish Empire can be brought into accord with Western standards, and that, during the necessary period of reform and reconstruction, the Ottoman judges and ministry shall be assisted by the presence of a certain number of jurists and legal counsellors of the Western States who would sit in the Court at the trial of a foreign subject.

When, a few years ago, it was proposed to unify the judicial system in Egypt, and to abolish the capitulatory regime in that country, a similar project of judicial reform was elaborated, by which the jurisdiction of the Egyptian Courts was to be general and comprehensive, while foreign judges would have their place in the Egyptian judicature, and in cases where foreign subjects were concerned, the Court was to be composed with one or more of such judges. But the project has been suspended owing to the new conditions of Egypt.

In one country which, till the war, formed part of the Ottoman Empire and where, therefore, the capitulations were in force, a system based on these principles is actually in operation. The

British authorities, on the military occupation of Palestine in 1917 and 1918, found that there were no consular Courts at work because the Ottoman Government had abrogated all such foreign jurisdictions. In accordance with the rights of a military occupant they maintained the jurisdiction of the country as they found it; but, recognizing the legitimate demands of foreign subjects, they prescribed that in cases in which foreigners were concerned, one or more British judges, according to the gravity of the matter, should be members of the Court.

Palestine has now been placed under a civil administration by the mandatory power; and the constitution of the country, which is contained in an Order in Council issued in August 1922, defines more precisely the judicial system to be applied to foreigners. In accordance with the provisions of the Mandate for Palestine, which was approved by the Council of the League of Nations in July 1922—although its operation is still suspended—consular jurisdictions are abrogated, so long as the mandate is in force. The Palestinian Courts, accordingly, have jurisdiction over all persons and things. They are composed partly of British and partly of Palestinian judges. Normally, the magistrates of the lower Courts are Palestinian, and in the higher Courts a British president sits with one or two Palestinian judges. In minor civil cases in which a foreign party is concerned, the foreigner may require the presence of a British judge in the Appellate Court, and in civil suits of greater importance the Court of Appeal must contain a majority of British judges. A foreigner charged with a minor criminal offence can require the case to be tried by a British magistrate; while, if he is charged with a major offence which comes before the higher Courts, he can require trial before a single British judge or a majority of British judges; and in the Appellate Court likewise there must be a majority of British judges. Cases of personal status of foreigners are to be tried by the British judge of the Court sitting alone, and applying the national law of the foreigner concerned; but power is given to call in the consul of the foreigner or a representative of the consulate as an assessor, who will advise the judge upon that law.

The Turkish delegates at Lausanne, however, have opposed the introduction of any such system in Turkey, maintaining (in somewhat bold construction of the facts) that both their legal and their judicial system give adequate security for the rights of foreigners. The only concession they were willing to make was that questions

of personal status of foreigners should be tried by the national Courts of the foreigner in his own country. But they have not hitherto been willing to accept the proposal of introducing foreign jurists in their ministry or foreign judges in their Courts.

The negotiations at Lausanne at the beginning of the year were inconclusive; but there are indications that the conference which is sitting at the time of writing will find a solution which will, on the one hand, afford that unity of jurisdiction that the Ottoman Government desires and, on the other hand, satisfy the foreign Powers of fair treatment for their subjects.

NOTE.—This article was written in May 1923 before the Treaty of Lausanne was signed. The position has now been defined by two instruments supplementary to that Treaty which have been signed by Turkey and the Allied Powers, and await ratification.

(1) A Convention respecting conditions of residence of and jurisdiction over foreign subjects in Turkey; and

(2) A declaration relating to the administration of justice in Turkey.

By the first instrument it is provided that all questions of jurisdiction as between Turkey and the other contracting Powers shall be decided in accordance with the principles of international law; and the Turkish Government declares that the Courts will ensure to foreigners, as regards person and property, protection in accordance with international law and the principles and methods generally adopted in other countries. In matters of personal status, however, which includes questions relating to marriage, paternity, capacity, guardianship, succession to personalty and family law in general, as regards non-Moslem nationals of foreign Powers in Turkey, the national tribunals established in the country of which the party whose personal status is in question is subject will alone have jurisdiction, unless all the parties to the case submit in writing to the jurisdiction of the Turkish Courts, in which case those Courts will apply the national law of the parties.

The declaration relating to the administration of justice recites that the Government of the Grand National Assembly of Turkey is in a position to assure to foreigners before the Turkish Courts all the safeguards of a good judicial system, but is nevertheless prepared to have an investigation made with a view to the institution of such reforms as may be rendered advisable by the development of manners and civilization.

Animated by this spirit, the Turkish Government propose to take immediately into its service, for not less than five years, a number of European counsellors, to be selected from a list prepared by the Permanent Court of International Justice from among jurists who are nationals of countries that were neutral in the Great War. These jurists will be engaged as Turkish officials, and will serve under the Ministry of Justice. Some will be placed in Constantinople and others in Smyrna. They will take part in the work of the Legislative Commissions, and it will be their duty to supervise the working of the Turkish Civil, Commercial, and Criminal Courts, without, however, interfering in the performance by the judges of any of their duties; and they will forward to the Ministry of Justice any reports they consider necessary. They will be authorized to receive all complaints to which the administration of justice may give rise, and to bring such complaints to the notice of the Ministry in order to ensure the strict observance of the law. They will also receive such complaints as may be caused by domiciliary search or arrests; and in the judicial Districts of Constantinople and Smyrna any measures of the kind shall be brought to the notice of the legal counsellor by the local representative of the Ministry of Justice, immediately after their execution.

The jurisdiction of the national Courts in matters of personal status of foreigners, and the appointment of these *prætores peregrini*, who have no jurisdiction but are merely watchful guardians of the law, is all that remains of the system of capitulations.

THE MINISTRY OF LABOUR OF GREAT BRITAIN.

II.

Employment and Insurance Department.—This Department is concerned principally with the administration of the Employment Exchanges and of Unemployment Insurance. The basis of this work is the Labour Exchange Act, 1909, and the Unemployment Insurance Acts, 1911–22.

Organization.—The Employment Exchanges were first established by the Board of Trade under the Labour Exchanges Act of 1909. The first Exchanges were opened in January 1910; there are now about 400 Exchanges in Great Britain.

When the State scheme of Unemployment Insurance came into force in July 1912, a number of Local Agents were appointed in the lesser populated places at which there was no Exchange for dealing with the local administration of the Unemployment Insurance schemes. These officers were not required to give the whole of their time to the work. After the war the functions of Local Agents were extended to include the registration and placing in employment of applicants whether insured or uninsured. From that time Local Agents were renamed "Branch Managers," and their offices became "Branch Employment Offices." There are now about 750 Branch Managers in Great Britain.

For administration purposes, Great Britain is divided into seven Divisions, each under the supervision of a Divisional Controller, with headquarters in London, Bristol, Birmingham, Leeds, Manchester, Edinburgh and Cardiff. The whole system is controlled by the Employment and Insurance Department at the headquarters of the Ministry of Labour.

The work of the Employment Exchanges falls under two main heads, viz. that of bringing together employers requiring workpeople and workpeople desiring employment, and that of administering the State Scheme of Unemployment Insurance, which has

now a very wide application, agriculture and private domestic service being practically the only occupations excepted.

Work under Labour Exchanges Act, 1909.—Under the first head, the facilities of the Exchanges are open without fee to any employer wishing to engage workpeople and to any workpeople desiring employment. The Exchanges deal with both skilled and unskilled workpeople, and during the eight years 1914 to 1921 inclusive the average number of yearly placings was 1,266,000.

Each Exchange and Branch Office deals with employers in its own area, but if vacancies cannot be filled locally particulars may be sent to the neighbouring Exchanges, whilst those vacancies in which the conditions are such as might attract applicants from more distant districts are sent to headquarters, whence they are transmitted immediately in the form of a weekly "newspaper" (with daily amendment sheets) to all Exchanges and Branch Offices in the country. Each Exchange and Branch Office is thus kept informed from day to day of unfilled vacancies at other Exchanges, etc.

It is frequently the case that workpeople, on being offered employment at a distance by an Employment Exchange, find difficulty in accepting it, owing to the cost of travelling to the place of employment. To meet this difficulty, railway warrants are issued under the Labour Exchanges Act, 1909, by the Exchanges, subject to a signed undertaking being given, either by the workman or his prospective employer, to repay the amount involved. Further, Section 30 of the Unemployment Insurance Act, 1920, and Regulations made thereunder, provide that where a person to whom such an advance of fare has been made is an insured contributor who would, in the opinion of the Minister, be entitled to unemployment benefit, the Minister may repay, out of the Unemployment Fund, one-half of the amount by which the advance exceeds 4*s*. If the person to whom the advance is made fails without reasonable excuse to enter on the employment found for him, the sum so repaid out of the Unemployment Fund may be recovered from him or deducted from any unemployment benefit thereafter payable to him, and, if so recovered, paid back into the Fund.

In addition, an Exchange Manager may arrange, on the request of an employer who has engaged a workman residing in another district otherwise than through an Exchange, for the advance of the necessary fare, provided that the employer deposits with the Manager sufficient money to cover the full fare.

Women are dealt with in a separate Department of each Exchange, which, in all but the very smallest Exchanges, is immediately in charge of a woman officer, and is staffed by women. The administration of unemployment insurance has greatly increased the work of the Exchanges in connexion with women. In January 1919 about 1,000,000 women were in Great Britain insured against unemployment, but this number has been increased to 2,575,000 under the Unemployment Insurance Act of 1920. Since the war, in addition to dealing with industrial and commercial occupations, the Exchanges have undertaken to deal with private resident domestic service as a permanent part of their work. The Exchanges also deal with applicants who are desirous of obtaining employment overseas ; they co-operate with the Central Committee on Women's Training and Employment in selecting women for training courses. In all these matters, and in interviewing and advising unemployed women, valuable assistance is rendered by the Women's Sub-committees of the Local Employment Committees (see p. 192).

Boys and girls under the age of 18 are dealt with in a special department of each Exchange, except in the case of the smallest Exchanges.

The following general features of Exchange work are important :

(*a*) *Vacancies due to a Trade Dispute.*—The Exchanges do not refuse to deal with these, but, in bringing them to the notice of applicants, they are required to supply the applicant with any information in their possession as to the existence and nature of the dispute.

(*b*) *Vacancies offering less than Trade Union Rates.*—The Exchange is not an authority for determining the rates of wages. Where there is a legal minimum, the Exchange cannot deal with the vacancy offering less than such minimum, but in other cases they can confine themselves to bringing the offer to the notice of the applicant and leave him to decide for himself whether he will accept it.

(*c*) *Accommodation at Exchanges.*—It is the policy of the Department to encourage meetings of industrial organizations, *e.g.* associations of employers, trade unions, etc., to meet at Exchanges. Very considerable use is made of these facilities, especially by trade unions.

(*d*) *Trade Union Vacant Books.*—The trade unions are encouraged to lodge their Vacant Books at the Exchanges, and about

10,000 branches of the trade unions take advantage of these facilities.

The administration of Unemployment Insurance involves, among other things, periodical visits (normally daily) to the Exchange or Branch Office, by unemployed workpeople for the purpose of signing the Unemployed Register or Vacant Book, the payment of benefit, the offer of suitable employment, and corresponding matters. Special arrangements apply to workpeople who claim benefit through their associations instead of through the Exchanges. When the number of claimants at a particular local office is very large, less frequent attendances may be required.

During the war the Exchanges were very largely used by the Government for the purpose of organizing the supply of labour for munitions and essential services. Following the Armistice, Exchanges were entrusted with important work in connexion with the resettlement of ex-service men. Employers were asked to reinstate ex-service men wherever possible. Special efforts were made to place disabled ex-service men in suitable employment, and in this connexion the Exchanges administer a special scheme known as the King's National Roll, under which employers undertake to find employment for a number of disabled ex-service men on a percentage basis (normally 5 per cent. of total staff).

Local Committees.—The Employment Exchanges are assisted by Juvenile Employment Committees and Local Employment Committees. Juvenile Employment Committees were first instituted in 1910, in connexion with the Juvenile Departments of Exchanges, under the Labour Exchanges Act, 1909, the Education (Choice of Employment) Act, 1910, or the Education (Scotland) Act, 1908. These Committees consist of representatives of the educational and industrial interests of the districts, together with other persons specially concerned in promoting the welfare of boys and girls, and may be set up either by the Ministry of Labour or the local Education Authority as the case may be. The number of the Committees at present is 313.[1]

In the year 1917 the Minister of Labour decided to associate with the Employment Exchanges a national system of Local Employment Committees (at first known as Local Advisory Com-

[1] This total includes: 172 J.E.C.s.
141 C. of E.s.
313

mittees) which would secure for the Department the full benefit of local knowledge and would bring the Exchanges into close touch with employers and workpeople in the various localities.

The Committees are entrusted with the widest functions of advice and guidance in the working of the Exchanges which are consistent with the responsibility to Parliament which the Minister must necessarily retain for the administration of the Department.

In general, there is one Local Employment Committee for each Employment Exchange in Great Britain. A Local Employment Committee is set up under Regulations made on June 19, 1917, and is composed of equal numbers of representatives of employers and workpeople, nominated, as a rule, by associations in the various localities, together with a certain number of additional members (in no case exceeding a third of the total membership) who are not necessarily connected with industry; among the additional members representation of ex-service men and of local authorities is provided for. The Chairman is nominated by the Minister, and the Committees themselves appoint a Vice-Chairman. Provision is made for the attendance of official representatives at the meetings of the Committees, and the necessary secretarial assistance and accommodation are provided by the Department. The Committees are appointed for a period of three years. The first period of office having expired, the Committees were reconstituted and re-appointed in 1921–22.

As a result of their local knowledge and influence, the Committees are able to give valuable assistance to an Exchange Manager in his primary duty of bringing together employers requiring workpeople and workpeople desiring employment, and to enlist the co-operation of employers in the use of the Exchange. Committees are invited to interview and advise applicants, such as disabled ex-service men who have special difficulty in finding employment, to investigate complaints and criticisms by members of the public, and to suggest improvements in the work of the Exchanges.

Sub-Committees may be appointed for dealing with special subjects. The membership of the Sub-Committees is subject to the approval of the Minister, who, however, leaves the Committees a considerable latitude as regards the selection of the members; the membership of Sub-Committees need not be confined to persons who are on the main Committee.

The state of local employment: it is one of the most important

duties of Committees to keep a close watch over the state of employment in their area. Where the local unemployment is severe, it is open to them to urge upon Local Authorities and private employers the need for widening the field for employment where necessary, and also to advise the Minister with regard to any difficulties which might be removed by departmental action. At the present time the Committees assist in the selection of men from the Exchange registers for employment on certain schemes devised to relieve abnormal unemployment, such as the arterial road schemes, and special schemes set on foot with the approval and assistance of the Government. Cases also arise where the Committees are called upon to consider the labour requirements of an important local industry and to make special arrangements for the supply of labour.

Unemployment Insurance.—The scheme of insurance against unemployment, on a compulsory basis, was instituted by Part II of the National Insurance Act, 1911. Under this Act the scheme applied compulsorily to about 2,750,000 workmen (Great Britain) in building, shipbuilding, engineering, construction of works and vehicles, iron-founding, and, to an extent, sawmilling, but it excluded non-manual workers. The contribution was 5*d.* a week, divided equally between employer and employed, to which the State added one-third. The benefit assured was 7*s.* per week for a maximum of 15 weeks in a year.

In 1916 a further 1,250,000 workpeople employed in certain trades (principally the metal and chemical trades) specially concerned with the manufacture of munitions of war, were brought in.

During the closing years of the war considerable discussion took place as to the desirability and necessity for a further extension of the scheme of insurance against unemployment. Owing to various causes, however, legislation for this purpose was not passed, and when the Armistice was concluded the only persons included in the compulsory scheme were those under the Acts of 1911 and 1916, numbering some 4,000,000. This provision was recognized as inadequate for the purpose of meeting the situation which arose. A scheme of free Out-of-work Donation was consequently instituted by the Government for both civilian workers and men and women discharged from the Forces. This scheme remained in operation for civilians for twelve months from November 1918. It was in force from November 1918 to March 1921 for ex-members of His

Majesty's Forces. It ran beyond the latter date in comparatively few cases. The number at present in receipt of Out-of-work Donation is negligible, and the scheme is practically at an end.

A Bill for the extension of Unemployment Insurance was introduced in the House of Commons in December 1919, and eventually came into operation on November 8, 1920, as the Unemployment Insurance Act, 1920. It is the Statute under which the permanent scheme of Unemployment Insurance is now being operated. The Act repeals all previous enactments relating to Unemployment Insurance.

This Act brings into insurance practically the whole industrial population, with the main exceptions of agriculture and private domestic service. There are other special exceptions, such as permanent railway servants, but, save for this one class, the numbers engaged in the specially excepted employments are not large. The number of workpeople covered is about 11,500,000, and includes all manual workers and those non-manual workers whose annual income does not exceed £250.

The general structure of the permanent scheme follows the lines laid down in 1911. This is briefly as follows.

In general, the scheme is worked through the machinery of the Employment Exchanges. While the workman is in employment his Unemployment Book, to which stamps representing contributions have to be affixed, remains in the custody of his employer. When the workman becomes unemployed he is required to lodge his book at an Employment Exchange or Branch Office, where he can make a claim for benefit.

The contributions are payable by means of stamps of the requisite values representing the combined shares of the employers and employees. A book is issued to every insured worker and he is required to lodge it with his employer. It is the employer's duty on every occasion of the payment of wages to affix a stamp of the appropriate value to the Unemployment Book of each employee, and he may deduct the amount of the employee's share of the contribution from the employee's wages.

The Unemployment Books are available for a period of twelve months, which runs from the beginning of July in one year to the beginning of July in the following year. Every July the Unemployment Books are exchanged. This is in the main effected by employers lodging the books of their workers in bulk at the Employment Exchanges, where fresh books are written up for the ensuing

year. It should, however, be mentioned, that a workman has the right, if he so desires, to take his book himself to the Employment Exchange and obtain a book for the new year in its place.

Workmen are also entitled, on application, to receive from the Department a statement showing the state of their accounts.

The stamps representing contributions are sold at Post Offices, and the proceeds of the sales are paid over weekly by the General Post Office to the Ministry of Labour.

The remittances are placed to the credit of the Unemployment Fund, and the State contribution is added to the amounts so received, and similarly credited to the Fund. When the Fund is in credit, *i.e.* when the revenue is more than sufficient to pay the benefits accruing due, any surplus moneys are handed over to the National Debt Commissioners for investment on behalf of the Fund. Owing to the exceptionally good period of employment immediately preceding and during the war, the Fund accumulated a considerable surplus which amounted in November 1920, when the existing principal Act was passed, to about £20,000,000.

Benefits are paid out of the Unemployment Fund. Owing to the severe depression which set in during the autumn of 1920, and has continued ever since, the accumulated Fund has been exhausted by the payments of benefit which have since been made. Power is contained in the Acts to borrow money from the Treasury for the purpose of paying benefit, and the amount outstanding due to the Treasury in December 1922 was about £16,000,000. The power of borrowing is limited to £30,000,000.

The benefit prescribed in the Acts is payable after the first six days of unemployment, which constitute a "waiting period." It may be paid for a maximum of 26 weeks in any "insurance year," but must not in any event exceed the proportion of one day of benefit for each contribution paid.

The conditions for the receipt of benefit are that a minimum number of contributions (12) have been paid, and that application for benefit has been made in the prescribed manner; that the contributor proves that since his application he has been continuously unemployed, capable of and available for work, but unable to obtain suitable employment, and that he has not exhausted his right to benefit.

The workman is disqualified from benefit if his unemployment is caused by a stoppage of work which is due to a trade dispute at his place of employment, or if he has lost his employment through

misconduct, or by voluntary resignation without just cause. Benefit is not payable while the workman is an inmate of a prison or a workhouse or any other institution supported out of public funds, or whilst he is resident outside the United Kingdom. Other disqualifications for benefit are the receipt of sickness or disablement benefit under the Health Insurance Acts or the receipt of an old age pension.

When an insured worker becomes unemployed, he is required to lodge his Unemployment Book at an Employment Exchange or Branch Office where he may claim benefit. When a claim to benefit is made on the appropriate form, an inquiry is addressed to the last employer of the workman as stated by him on the claim form, in order to ascertain whether the conditions for the receipt of benefit are satisfied and whether any of the disqualifications apply. The Manager of the Exchange acts as an Insurance Officer (see below) for the purpose of authorizing straightforward claims. If any kind of doubt arises as to the validity of a particular claim it is sent to the Chief Insurance Officer in London for adjudication.

During the currency of his claim an insured worker is required to attend at the Exchange daily, or otherwise, in order to give evidence of the fact that he is unemployed. This is done by his signing a declaration during the normal working hours of his trade, that he is unemployed and unable to obtain suitable employment. If the applicant resides more than a prescribed distance (six miles) from the nearest Exchange or Branch Office, he is not required to attend there personally for the purpose of giving evidence of unemployment, but may forward a certificate signed by two persons as to his remaining unemployed.

Claims for benefit are adjudicated upon, in the first instance, by officers appointed under the Act known as Insurance Officers. If the Insurance Officer's decision is unfavourable to the claimant the latter (or his trade union if he has claimed benefit through the Union) has a right of appeal to a Court of Referees consisting of an independent Chairman, a representative of employers, and a representative of contributors. The Chairman and the panels are appointed by the Minister of Labour. Either the Insurance Officer or the trade union to which the contributor belongs, or the contributor himself (if leave is given to him by the Court) has a further right of appeal from the recommendation of the Court of Referees, to an Umpire appointed by the Crown, whose decisions are final and conclusive.

While all claims to benefit have to be made at an Employment Exchange or Branch Office in the first instance, and benefit is in general paid there, power is given to the Minister under s. 17 of the Act to enter into arrangements with associations of contributors (principally trade unions) under which members of such associations may prove their unemployment and receive their benefit through the machinery of the association. Before such an arrangement can be made, however, the Minister has to be satisfied that the rules of the association provide payment, out of its own funds, of unemployment benefit to its members and that the association has in operation a system for obtaining notification of opportunities of employment and for placing its members in employment. State benefit paid out by associations under this arrangement is subsequently repaid to the association by the Unemployment Fund. The associations are further entitled to a grant in aid of their administrative expenses for every week of State benefit paid to their members under the arrangement. Early in 1921 arrangements had been completed or were in course of completion with about 200 associations having a membership of nearly 4,000,000 persons. Owing, however, to the subsequent industrial depression and the consequent strain on the financial resources of the associations, a number of these arrangements were either terminated or not completed. The number of arrangements in operation at the end of 1922 was about 140, covering a membership of 1,000,000.

An important provision of the Act of 1920, which was a new feature of the scheme, was the right which was given to industries to contract out of the general scheme and set up special schemes of compulsory insurance for the workers in an industry. Before such a special scheme can be approved it has to be submitted by a Joint Industrial Council, or an Association fully representative of the majority of employers and employed in the industry. The Minister has to be satisfied that insurance against unemployment in the industry can be more satisfactorily provided by a special scheme than by the general provisions of the Act, the scheme must cover all the employed persons in the industry, and the benefits must be not less favourable on the whole than the benefits provided by the Act.

The industries which might naturally be expected to contract out of the general scheme were those whose experience of unemployment is less than the average rate of unemployment of all the industries included in the general scheme. In other words, only

those industries might be expected to contract out which could, by reason of their lower rate of unemployment, provide greater benefits for the same rate of contribution as under the general scheme, or the same or slightly better rate of benefit for a lower contribution. In view of this fact, the rate of State contribution payable to a special scheme is reduced to a sum not exceeding three-tenths of the contribution which would otherwise be paid by the State in respect of contributions from the industry if the employers and employed persons in the industry remained in the general scheme.

Only one special scheme has, so far, been approved, viz. that for the Insurance Industry, which covers about 85,000 employed persons.

In view of the special provision for unemployment made in the Acts of March and July, 1921 (hereafter referred to), to meet the exceptional amount of unemployment, it became necessary to suspend the right of additional industries to contract out until the Unemployment Fund had attained a position of solvency.

Another feature of the scheme which should be mentioned is the right of insured persons to receive a refund in respect of their contributions. This provision follows generally the lines of s. 95 of the Act of 1911. The refund made is the excess of the employed person's share of the contributions paid in respect of him, less any benefit he has received. Refunds are not payable unless the employed person has reached the age of sixty and has paid in the aggregate a certain number of contributions.

The foregoing paragraphs describe the permanent features of the scheme. Owing to the acute industrial depression, it has been necessary to add to the permanent scheme a number of temporary provisions which are summarized in the following paragraphs.

It was realized, when the Act of 1920 was being framed, that special provision was required to meet unemployment, occurring immediately after the passing of the Act, of those persons who were being brought into compulsory insurance for the first time. Accordingly, it was provided by s. 44 of the Act of 1920 that eight weeks' benefit might be drawn if four contributions had been paid under the Act. Between the passing of the Act on August 9, 1920, and its coming into operation on November 8, 1920, the industrial situation changed materially, and when the Act came into operation considerable numbers of workpeople were unemployed who had not paid even four contributions. The Unemployment Insurance (Temporary Provisions Amendment) Act, 1920, was accordingly

passed in December 1920, providing that if an employed person could show that, although contributions had not been paid in respect of him under the Acts, he had in fact been employed in an insurable occupation during a certain number of weeks during 1920, eight weeks' benefit might be paid to him.

Early in 1921 it became apparent that the trade depression was so severe that many persons who would normally have paid contributions under the Act entitling them to benefit could not qualify for benefit because, owing to the exceptional industrial position, they had not paid contributions and therefore could not qualify for benefit. The Unemployment Insurance Act, 1921, was accordingly passed on March 3, 1921, and came into operation immediately, making exceptional provision for the payment of Unemployment Benefit to persons who were not qualified by reason of not having paid contributions.

Under the Act of March 1921 it was provided that during each of two special periods (from March 3 to November 2, 1921, and from November 2, 1921, to July 2, 1922) unemployed persons might, subject to certain conditions, draw up to a maximum of sixteen weeks' benefit. The Act also increased the rates of benefit and made provision for an increase in the rates of contribution. Further, the waiting period was reduced to three days.

Notwithstanding the exceptional provision of benefit made by the March Act, large numbers of persons remained unemployed and had exhausted their rights to benefit in July 1921. It was therefore decided to introduce fresh legislation making further provision for this class of case.

By a further Act passed on July 1, 1921 (the Unemployment Insurance (No. 2) Act, 1921) power was given to the Minister to extend the maximum period of benefit which might be drawn in each of the special periods by six weeks, making the maximum period of benefit 22 weeks if the Minister so decided. At the same time, the rates of benefit were reduced and the rates of contribution were increased, and the waiting period was restored to one week.

Further, as part of the programme of the Government for dealing with the exceptional amount of unemployment existing in the autumn of 1921, the Unemployed Workers' Dependents (Temporary Provision) Act was passed in November of that year, making provision for the payment of allowances, in respect of the wives and dependent children of unemployed workers who were in receipt of benefit under the Unemployment Insurance Acts. The general

scheme of this provision was, that persons who were liable to be insured under the Unemployment Insurance Acts and their employers should pay additional contributions for the purpose of meeting the added expenditure due to the grant of allowances for dependents. This provision was temporary in character, and was originally made for a period of six months only, ending on May 7, 1922.

The second spell of 22 weeks' benefit referred to above (*i.e.* that payable in the Second Special Period) became exhausted in the case of those who had drawn benefit continuously from the beginning of the Second Special Period (November 3, 1921), on April 5, 1922. As the general level of unemployment had not altered materially, a further grant of benefit in two additional Special Periods was made by another Act passed in April 1922.

By this Act (the Unemployment Insurance Act, 1922), the Second Special Period was terminated on April 5, and 15 weeks' benefit (subsequently increased by a further Act to 22 weeks' benefit) was authorized in the Third Special Period running from that date to November 1, 1922. The period of 15 weeks' benefit, if paid on the covenanted basis, might be continuous, but if paid on the uncovenanted basis each period of 5 weeks' benefit was to be followed by a period of 5 weeks' "gap" without benefit. By a later Act passed in July 1922 the 5 weeks' "gap" was reduced to one week. The Act of April 1922 continued the payments in respect of dependents which would otherwise have expired in May 1922, but amalgamated these payments with the ordinary rates of benefit.

The Act of April 1922 also combined the contributions previously payable under the Unemployment Insurance Acts and the Dependants Act, respectively, but did not increase the total rate. The present rates of contributions are therefore:

	Employer's Share	Employee's Share	State Contribution
Men	10*d.*	9*d.*	6¾*d.*
Women	8*d.*	7*d.*	5¼*d.*
Boys	5*d.*	4½*d.*	3⅜*d.*
Girls	4½*d.*	4*d.*	3⅜*d.*

Under the same Act the Fourth Special Period began on November 2, 1922, and ran to July 1, 1923. During this period a further 22 weeks' benefit might be paid, of which 18 weeks might be paid on the covenanted basis provided that the claimant had the necessary contributions available.

These exceptional provisions for the payment of "uncovenanted" benefit, *i.e.* benefit to persons not qualified on the basis of contributions paid in respect of them, have thrown a considerable amount of work on the Local Employment Committees and Juvenile Employment Committees. In order to qualify for such benefit, applicants have to fulfil certain special conditions; for example, they must be normally employed in insurable employment, and genuinely seeking, but unable to obtain, whole-time employment. Further, uncovenanted benefit is not as a rule payable to juveniles and single persons living with relatives who are in a position to maintain them; nor to married women living with their husbands who are in employment. Cases involving the fulfilment of those conditions are referred to the Committees, as are also doubtful cases arising in connexion with benefit in respect of dependents.

In this way the Local Committees have interviewed some millions of applicants. This work still continues and is most valuable from the point of view of the administration of uncovenanted and dependents' benefit.

Settlement Overseas.—The Employment Exchanges also act as the official machinery for dealing with applications under schemes under the Empire Settlement Act of 1922 for the settlement of persons in the Oversea Dominions. That Act was passed in May 1922, after consultation with the Dominion Governments. It authorizes the grant of assistance for oversea settlement out of the British Exchequer on a basis of equal grants from the respective Governments concerned.

A scheme was agreed to with the Government of Australia in July 1922, under which assisted passages may be granted to selected applicants who, after completing the necessary forms at the Exchanges, are interviewed at the Exchanges by representatives of the Dominion, and such grants and loans are made as the circumstances appear to warrant in each case.

Further schemes for settlement overseas are now under consideration, and it is anticipated that the Employment Exchanges will take a considerable share in their operation.

Apart from the operations of the Exchanges under the Empire Settlement Act, they are used as the machinery for dealing with offers of work overseas. Co-operation is maintained with the Oversea Settlement Office and the official representatives of the Dominions in London, who notify the requirements of their various

Governments as regards labour and the effect of any changes in their Immigration Regulations.

The Local Employment Committees have undertaken to interview any male applicants in need of advice and information as to the conditions of life and work overseas, and to advise the Department in regard to their general suitability. Special facilities are also provided for women applicants to be personally interviewed and advised by Women's Sub-Committees of the Local Employment Committees.

Interrupted Apprenticeships Scheme.—A temporary section of the work of this Department, to which reference may also briefly be made, is the Interrupted Apprenticeships Scheme. Under this scheme, which affected bona-fide industrial apprentices whose apprenticeships had been interrupted by service in H.M. Forces, provision is made for the payment of a State Grant during the resumed apprenticeship with an employer, and a maintenance allowance when the man is being trained *in an institution*. The scheme also provides for payment of adequate wages by the employer.

No further applications are being accepted under the scheme, which will come to an end when the present trainees have run their course. All applications were dealt with, etc., through the Exchanges.

Aliens Restriction Order.—Article 1 (3) (*b*) of the Aliens Order, 1920, requires a permit to be obtained by an employer from the Minister of Labour before an alien can be engaged from abroad for employment in this country. The procedure involves that where it is thought that the services in question can be performed by labour already in the country (whether British or alien), the case is referred to the local Exchange concerned, from which the employer is communicated with and steps taken to fill the vacancy, if possible, from labour already in the country.

Finance Department.—The functions of the Finance Department are, as its name implies, to deal with all financial and accounting questions affecting the Ministry of Labour. The head of the Department (the Accountant-General) is the chief financial adviser to the Permanent Secretary, and acts as accounting officer for all Departments of the Ministry. All proposals (other than establishments questions) involving expenditure or affecting income are referred to the Finance Department for consideration before being submitted to the Secretary for his or the Minister's consideration.

A Branch or Section of the Finance Department is attached to each administrative Department, or group of Departments, of the Ministry and is housed with them so far as possible. In addition, a Local Finance Office has been established in each of the Divisions into which the country is divided for administrative purposes.

Establishments Department.—The duty of this Department, under the Director of Establishments, is to see that each Department of the Ministry is efficiently and economically staffed. The Establishments Department in consequence (1) deals with recruitment, appointment, remuneration, promotion, leave, resignation, gratuities, and, within prescribed limits, the welfare and discipline of all persons under contract with the Department; (2) conducts all negotiations and correspondence with the Treasury relating to the recruitment, numbers and salaries of the staff; (3) is generally responsible (*a*) in conjunction with H.M. Office of Works, for the provision of equipment, lighting and heating in all Ministry premises, (*b*) in conjunction with the General Post Office for the installation of telephone services, and (*c*) in conjunction with H.M. Stationery Office for all printing and the supply of stationery.

The Department also has a special responsibility in regard to the Departmental Joint Council which has been established in the Ministry of Labour (as well as in a number of other Government Departments) on the lines of the "Whitley" Committee's Report, already referred to.

Solicitor's Department.—This Department advises all Departments of the Ministry on legislation and legal questions. It conducts prosecutions in connexion with Unemployment Insurance and Labour Exchanges, etc. It also deals with all civil proceedings by and against the Ministry.

Industrial Training, Appointments and Civil Liabilities Department.—1. *Industrial Training.*—This temporary Department of the Ministry of Labour is now concerned mainly with the training of disabled ex-service men. Previously it had a Women's Section, but its functions in this respect are now limited to the training of a small number of disabled ex-service nurses. As regards disabled ex-service men, by an Order in Council of May 9, 1919, the responsibility for the industrial training of disabled ex-service men was transferred from the Ministry of Pensions to the Ministry of Labour Training Department. The Ministry of Pensions retains the responsibility for providing training to those disabled men who still require treatment.

Training may be provided either in institutions, such as Government Instructional Factories or Technical Schools, or in private works, or in both. During the period of training men are entitled to receive certain allowances. It is the policy of the Department, in providing and carrying out training, to act in consultation with the representatives of employers and workmen in the trades concerned, and for this purpose a large number of National and Local Trade Advisory Committees have been set up.

In addition to a Headquarters Staff, there is a local staff organized under Divisional Directors of Industrial Training, by whom the executive powers of the Ministry are exercised locally.

2. *Appointments Branch.*—This temporary Department, as has already been mentioned, was constituted early in 1918 to deal with the resettlement in civil life of ex-officers of H.M. Forces, and also with ex-service men from the ranks of similar educational qualifications or professional and business attainments. The schemes of professional training which the Department administered are now closed except for a limited number of disabled ex-officers, and the Department is mainly concerned with assisting men of the type covered by the Branch to secure appointments. In this work it acts in co-operation with the British Legion (Officers' Association) and is assisted by voluntary panels of professional and business men.

There is a Headquarters organization and a local organization in the provinces.

3. *Civil Liabilities Branch.*—This temporary Branch, which was originally established under the Local Government Board, had assigned to it the administration of two schemes. The first was the Civil Liabilities Scheme, 1916, enabling assistance to be given to serving officers and men who were unable, by reason of their military service, to meet certain specified financial obligations such as rent, etc., without serious hardship. This scheme was terminated in July 1920. The second was the Civil Liabilities (Resettlement) Scheme of 1918, which provided that under certain conditions ex-officers and ex-service men might be granted financial assistance in respect of specified contractual obligations or towards the purchase of stock in trade or shop fittings, etc. Able-bodied men as well as disabled men were eligible for assistance, but at the present time the Department is concerned almost entirely with disabled men.

CITY GOVERNMENT IN THE UNITED STATES.

[*Contributed by* Sir ALBERT GRAY, K.C.B., K.C.]

"THERE is no denying that the government of cities is the one conspicuous failure of the United States": so wrote Lord Bryce many years ago. The corruption of civic life in New York, Chicago, Philadelphia and other great communities was notorious, while in smaller places the evils were less gross and palpable in proportion as they afforded less booty to the spoiler. Though many of the smaller places no doubt led a tranquil life, municipal corruption was widespread throughout the Union. The Americans themselves, while glad that foreigners should praise their institutions, hardly expected a good word to be said for their city governments. The unsatisfactory conditions prevailed during the whole of last century, and cannot be said to be yet removed. The Americans took with them English forms of local government, but those forms had already become outworn in England and were ill fitted for cities developing under industrial conditions. At the Revolution they had not the guidance of the English Municipal Corporations Act of 1835. They attempted to work out their own salvation by different means and on no uniform lines. States and cities vied with each other in experiments; and those enjoying a temporary success in one place were adopted in others with little regard to difference of conditions, while corrupting influences prevailed over all efforts to eradicate them. In the United States, where, as elsewhere, men, not walls, make the city, the personnel was too frequently unfit to work the machinery, however carefully constructed. The principal causes of the inferiority of the men composing the city councils, and also the State Legislatures who ruled the cities, were two. Throughout the nineteenth century all the best brain and character was devoted to the development of the vast territory, and there was no class of semi-leisured men of good report ready to give their time to city affairs. The other chief cause was that the flood of undesirable immigrants concentrated on the towns, where their voting power

enabled them to debauch the constituted authority by graft and peculation. The reformers were always at work, now here, now there: and Lord Bryce's chapters on city government gave, as Americans cordially recognize, an impetus to their efforts which has led to the substantial betterment of recent years.

A Complex Problem.—The variety in the government of American cities, their constitutions, powers and relations to the State, is so great that in treatises on the subject it is only possible to deal with the salient features of groups or to take the cities singly. There is little or no uniformity of treatment in any State. After enumerating the chief powers of municipalities, one writer observes that "every American city has all of these powers in greater or less degree, but rarely are they all alike in any two cities; . . . the limitations vary not only in different States, but even in different cities of the same State."[1] While an adequate description of the English boroughs could be given in a few pages, a fairly comprehensive view of American city governments would require many stout volumes. The experiments of the last twenty years, however, are all in the direction of uniformity, and deserve the attention of those who are not so complacent as to believe that in this department England has nothing to learn. For a due appreciation of the difficulties in the way of American reform, some understanding is wanted of the existing conditions and the causes which have produced them.

Geographical Causes.—The striking difference between the existing conditions of municipal government in England and the United States is due partly to geographical, and partly to historical causes. The diminutive size of England has enabled it to govern itself from a single centre, and indeed geography alone would under modern facilities of transport present no difficulties to a uniform administration in both public and local affairs for the whole United Kingdom. In the United States this was impossible. The length of the American seaboard covered by the early settlements, and their separate origins, had already necessitated their government in separate colonies, which at the Revolution naturally became separate States and these became multiplied by the subsequent annexations. A Federal Government was essential for the United States if a national unity was to be attained. In the division of powers between the Federal and State Governments, all the powers in relation to municipal affairs fell to the latter.

[1] See *Government of American Cities*, by Prof. W. B. Munro (p. 82), from which excellent work my quotations are taken, except where otherwise marked.

Uniformity of treatment throughout the country thus became impossible, and, as we shall see, it failed to be attained within the States themselves.

Historical Causes.—Before the Revolution the few boroughs received their charters from the Governor of the Colony under his prerogative powers delegated by the Crown, and these in general approximated to English models of the period. The mayor was, however, usually nominated by the Governor, not appointed by the councilmen. After the Revolution the charters were granted by the State Legislatures, and thenceforward were in fact statutes. In colonial days the boroughs thus enjoyed freedom from legislative interference: subsequently, they fell completely under the domination of the Legislatures, and not one of these was found competent to establish due relations between themselves and their municipalities, or to create a uniform system of administration for the cities. One of the last examples of a charter on the English model was that of Philadelphia in 1789. By a partial reversion to English precedent the appointment of mayor was given to the aldermen, who were elected by the people on a qualification different from that of the councilmen. The officials of the Corporation were appointed by the Council. All the powers were thus centred in the elected body. This framework, undoubtedly right in principle, failed to satisfy public opinion, probably owing to the inefficiency or malpractices of the local councilmen. Then began an era of perpetual change, lasting for more than a century, during which the councils were shorn of their powers and degraded in status. A salient feature of the first changes was a desire for divided powers, a doctrine which "never had a single sound prop to rest upon," every division necessitating new checks and balances. "The dominating factor in the development of municipal framework during the first quarter of the nineteenth century was the influence of the federal analogy," which placed a veto power in the hands of the mayor, created double-chambered Legislatures, and entrusted separate executive functions to the upper of these two chambers. An example of this form is seen in the 1796 charter of Baltimore, where the mayor was to be chosen by an electoral college and the council was composed of two chambers. Thus "American municipal development had taken a course of its own, cutting adrift from earlier English influences. It long since became apparent to thoughtful men that this radical swerve was unwise in its day and unfortunate in its consequences."

The English Method.—England was saved from the municipal troubles which have oppressed the United States by the wise legislation of 1835. The Municipal Corporation Act of that year gave to our boroughs the sound constitution which, with little alteration, has held good for nearly ninety years and has proved suitable to both large and small towns. The incorporation is left to the exercise of royal prerogative: a charter once granted, the new borough becomes subject to the general law. Though born of prerogative, its whole life is passed under statute. The public law could not be expected to meet all the necessities of the individual towns; for these, special application to Parliament is required. Where a general power to borrow money is given by statute, the actual amount to be borrowed has to be sanctioned by the appropriate State Department: where there is no general power, Parliament must give it. Boroughs appoint their own auditors, but a large number have submitted themselves to the control of Government auditors. The powers of legislation, though extending to all matters of "peace, order and good government," are in fact small; and the by-laws so made require the approval of the State Department, which is thus enabled to preserve a large measure of uniformity: if not reasonable, they may be upset by the Court.

Legislative Powers of American Cities.—These are far more extensive than those of English boroughs. They cover all matters relating to municipal government which are not provided for in the charter or by statute. They must not contravene the federal or State constitution, and must be reasonable; but otherwise they are free from the restrictions applicable to English by-laws. They include powers in relation to protection of life and property, public health and morals, building laws, sanitary regulations, theatres, police and traffic. It has been a misfortune that American cities have the power to grant "franchises" for public utilities, such as tramways, gas and water, a power which is in England reserved to Parliament; "on the whole, no municipal power has been more grossly abused than this." [1] While thus the legislative powers of an English borough are insignificant, those of American cities are so extensive as to give some justification for the separation of legislative and administrative functions. The product is so voluminous that (*e.g.*) the revised ordinances of Chicago make

[1] There is much graft in connexion with the grant of these franchises, and the persons or companies desiring them contribute largely to party election funds; frequently, for better security, to those of both parties.

up two solid tomes of over a thousand pages each, while other cities make a nearly equal showing.

Division of Powers.—The benefits which England owes to the uniformity of its municipal institutions and to the attendant checks contributed by parliamentary and departmental control will be readily understood when American conditions are brought into contrast. There we find endless variety of constitution and hectic change in checks and balances. "When the inhabitants of a city," writes Lord Bryce, "found that they did not receive as matter of fact the good government which they desired, it did not at first occur to them that the trouble was to a large extent fundamental in their form of charter; or, if it did, the first effort at remedy led to worse mistakes than before. Starting with the theory that the path to safety was through division of power, they resorted to all manner of expedients which would compass that end." Loss of power and responsibility led inevitably to the degradation of the city councils.

The stages by which this situation was reached may be described in some chronological order, but it must be premised that the various changes were made sporadically, without concerted method in states or cities, some few only being universally adopted.

Separate Election of Mayor.—This was the first important swerve from English precedent and began, as already stated, at Philadelphia in 1789. The practice became, and is still, universal throughout the States. Under the Baltimore charter of 1796, the mayor was to be elected by an electoral college: in time popular election was substituted. It may be admitted that better men will stand for election as mayor than for councillorships; on the other hand, our method of election from the council enables us to get a man of outstanding ability by first electing him an alderman. The American practice would not be open to much criticism, if it had not led to the exaltation of the mayor above his council: he was no longer to be *primus inter pares*.

Independent Powers of the Mayor.—The Baltimore charter of 1796 further gave to the mayor the appointment of the city officers subject to the approval of the aldermen, which was afterwards dispensed with. In many other cases, the heads of departments were elected directly by the people. When departmental powers came to be entrusted to boards, the boards were appointed by the mayor. Other powers assigned to the mayors have reference to legislation; one positive, that of initiating legislation by message, the other negative, that of thwarting legislation by veto. In a large number

of cities he also prepares the city budget. This accumulation of power in his hands tends to place him in antagonism to the council and then outside it. "In by far the larger number of American cities the council chooses its own presiding officer, and the mayor does not undertake any part in its sessions, or even attend them."

Executive Officers and Boards.—In many cases the appointment of executive officers was given to the mayor, in others they were elected by popular vote. Sometimes, again, the patronage reverted to the mayor. The mayor, however, was apt to use his patronage for party purposes; and one of the last expedients for remedy of this evil is the appointment of an officer from three names submitted by a Civil Service Commission. All that can be said for this plan is that it offers a reasonable promise of competency in the person selected. Election by the voters is still a common practice, and, in the case of some of the largest cities, for such offices as those of City Controller, Treasurer and Auditor. Popular election cannot, however, be expected to throw up competent men for offices requiring high professional qualifications. This has been only gradually recognized in the United States in the case of judicial appointments. Besides election by the mayor, or popular vote, other expedients are resorted to. The board of Police Commissioners is appointed for St. Louis by the Governor of the State, and for Baltimore by the State Legislature; but these methods are rare, owing to resentment against the interference of the State in municipal affairs. In Philadelphia, the education board is appointed by the judges of the Court of Common Pleas. The policy of this course, the object of which is to avoid partisan influence, is, however, contested on the ground that it subjects the judiciary to political pressure.

Interference of the State Legislature.—The fundamental principle that the State has power to legislate for the cities within its area is fully recognized, and this authority was in the earlier constitutions subject to few restrictions, in some cases to none. The growing strength of the towns in the latter half of last century, however, demanded some measure of independence, and restrictions of the State power became common in all new and revised constitutions. The necessity for them arose from the practice of the State to legislate for cities without their request or against their wishes. In England, Parliament, having passed the Municipal Corporations Act for all boroughs, in practice never interferes with individual boroughs except in Bills promoted by themselves. In the United States, the State Legislatures "have used their powers

unsparingly"; in many cases justly, as we are told, in order "to deliver the cities from the bondage of spoilsmen." In many other cases the interference "has been actuated by an ill-concealed desire to serve purely partisan or personal ends." In the course of twenty-three years (1885–1908) the Massachusetts Legislature passed no less than 400 special laws for Boston alone. In a large number of cases constitutional amendments have imposed restrictions on the power of the State to legislate for the cities against their own wishes. It is easy to suggest that the State should not legislate for cities, except at their own desire or to remedy flagrant misfeasance; but of what worth is an appeal to the good sense of a Legislature which itself is actuated by party motives? Bad legislation in the United States is, to some extent, prevented not only by the constitutions but also by the veto, a weapon wielded by the President, governors of States and mayors. Its loss in England may occasionally be regretted in regard to measures so branded with unconstitutionality as the Trade Disputes Act and the Parliament Act. If, however, it is used too frequently it becomes dangerous, for it destroys the responsibility of the Legislature. Recently all America was roused to a fury of excitement when Governor Smith of New York signed the Bill repealing the Prohibition Laws of the State; he was assailed for yielding to the people's will; but not a dog barked outside the State House when about the same time he vetoed no less than 126 other Bills passed by the State Legislature. Of these, 64 were Bills relating to cities which had been passed against their wishes. The other 62 are described as "duplicates, unnecessary (?), defectively drawn, unconstitutional or in conflict with other Bills already signed."[1] Thus does the Legislature pass obnoxious and ill-considered measures of every kind, against which the only reliance of the public is upon the governor's veto. Whether or not there is any school of drafting in the United States, such as is provided in the office of the Parliamentary Counsel and in those of the parliamentary agents in England, the amount of bill-drafting must be colossal. It is clear, however, that local Bills in the State Legislature do not get anything like the supervision given by the Chairmen of our two Houses.

Home Rule Charters.—The cities were not, however, content with restrictions. The revised Missouri constitution of 1875 enabled the cities to frame their own charters without reference to the Legis-

[1] *New York Times*, June 2, 1923.

lature. This apparent abdication by the State has been followed entirely by twelve States and partially by a few others. Born of dissatisfaction with the inefficiency of the State Legislature, it rests on no good principle of political science. The abdication cannot be real because the State cannot rid itself of liability in respect of police, public health, taxation and other matters of public concern. The Home Rule charter system, it may be admitted, has had some success, due to the failures of State Governments, but it puts far off the prospects of uniformity.

The Initiative.—By this term is meant the right of a definite percentage of the voters to propose charter amendments or ordinances and to require that these be submitted to the people at a regular or special election. This reserve power connotes a distrust of the people's representatives. "The quality of the men who make the ordinances in American cities, including ordinances which carry appropriations and grant public privileges, has steadily declined during the last half-century." The system indeed prevails in Switzerland, where a recent employment of it for the imposition of a capital levy created widespread commercial havoc. Linked with the initiative is the referendum, for which restriction on the powers of the Legislature there is more justification in theory, though it presupposes a competency in the voting mass which we know is not there. Both the initiative and the referendum are in use in a large number of cities.

The Recall.—Under this widespread law a city officer may be removed by popular vote, originated by petition of a prescribed number of citizens. Other candidates are at the same time put forward, so that the vote is given not solely on the misfeasance of the indicted official, but also on the general merit of the competitors. The weapon of recall is rarely invoked.

The Commission System.—The divagations of American city government, of which I have given the more salient features, all tended to deprive the councils of executive power and to enhance the authority of the mayor and the separate departmental boards and officers. The solidarity of the Council was destroyed, giving place to divided powers, tempered by democratic and autocratic checks and balances. The reformers were always at work, but too frequently on wrong lines, and corruptions prevailed in spite of their efforts. Such was the condition at the close of last century. The great reaction now bidding fair to sweep over the United States is largely due to a tidal wave which in September, 1900, partially destroyed the little town of Galveston in Texas. Before this it

had been badly governed, and the citizens determined that the municipal and material reconstruction should be entrusted to a commission of five business men elected by the people. Intended at first as a temporary expedient, its success procured its adoption in other Texan cities and then beyond. The Galveston model provides for a mayor and four commissioners who are heads of the four departments of city business. The mayor presides and supervises, but has no independent powers. At first, the commissioners were chosen as experts; it was soon found, however, that popular election rarely produced qualified experts. The men now generally elected are amateurs capable of appointing and supervising the actual administrators. Both the elected man and his qualified subordinate have to be paid, and this means two salaries for one job. The chief virtue of the system lies in the reunion of the city powers. It has now been adopted in about 300 cities of the union.

The City Manager System.—Efforts were now made to cure the failings of the commission system by amendments involving the appointment of a single manager for the whole administration work of the city. The first large city to adopt this plan was Dayton, Ohio, in 1914. All the municipal powers are vested in a commission or council of five members chosen from the city at large. The member receiving the largest vote is styled the mayor, who presides at the meetings but has no special powers. All the commissioners are paid. They are obliged to appoint a city manager and thereafter cannot interfere directly with the administration. They may, however, remove the manager, who is also subject to "recall" on the vote of the people. Under the commission system, as above stated, each commissioner superintends a department; but under this new system the manager rules all the departments and appoints their heads and staff. Policy, legislation and finance belong to the council, though the Budget is prepared for them by the manager. This scheme has been adopted by the National Municipal League in their model charter, and the adoption of it in upwards of 300 cities is largely due to the unwearied exertions of that Society. Though the Dayton plan provides for a commission of five, the model charter, in view of the deliberative and supervisory functions of the body, wisely raises the maximum to twenty-five. The scheme is open to some criticism. In my view, the election of the mayor should be left to the commission, the member getting the largest vote not being necessarily the best chairman. Moreover, the complete non-interference with administration can hardly be maintained in

practice. Commissioners who have power to remove a manager will surely warn him from time to time before proceeding to that extremity. The supremacy of the council should be preserved in supervisory and appellate powers.

A Move towards Uniformity.—A praiseworthy step was taken by Ohio in 1902 when it passed a law requiring all financial reports and accounts of cities to be uniform as prescribed by a schedule.

United States in Earnest.—The course of events during the last twenty years proves that in the matter of municipal reform the American people are in earnest. Besides the national Municipal League and other bodies of the kind, every large city has its bureau of municipal research, through which new ideas and experiences are disseminated. Though excellent constitutions may be provided, the great desideratum now is to get good men to work them; and they are wanted for both the State Legislatures and the City Councils. There are signs of considerable improvement in the cities in this respect, thanks to the efforts of bodies corresponding to our Ratepayers' Associations. But when will the voters of neither Anglo-Saxon nor Germanic stock, who now control the elections in the larger cities, and whose leaders are after the spoils, become imbued with a sense of civic honour? Possibly under stringent legislation spoils may be unattainable and the city government may be left to honest men.

Prospects in the United States and England.—A main characteristic of American democracy is the tendency to personal rule. The President is much of an autocrat, with a Cabinet of administrators, none of whom is the product of popular election. The governor of a State has great powers, as has the mayor in cities not under the commission or city manager system. In nearly all cities departmental executive is personal. In England, though our executive in public affairs is altogether personal, in local matters it is transacted clumsily, tardily and expensively by councils and their committees. A large portion of it could be more smartly and efficiently done by executive officers. In this matter we should do well to follow the United States' lead; she is following ours in again concentrating the major powers in the council. The best form of municipal government would seem to be one in which policy, supervision and finance are the concerns of the council, and the administration is confided to executive officers. The ships of the United States and England, after their devious courses and varied experiences of weather, may reach the same good port.

THE SWISS CIVIL CODE.[1]

[*Contributed by* ERNEST J. SCHUSTER, ESQ., K.C., LL.D.]

MISS WILLIAMS' excellent monograph offers a favourable—though somewhat belated—opportunity for calling the attention of the readers of this *Journal* to the latest, and in some respects the most successful, instance of the codification of private law.

The history of modern codification begins in 1794, the date of the publication of the Prussian "Landrecht." The French "Code Civil des Français" (subsequently known as the "Code Napoléon") which followed in 1804, became the law, not only of France, but also of a great part of Germany, and was subsequently adopted in a more or less modified form in Belgium, Italy, Holland, Luxemburg, Portugal and Spain, and it has also influenced the Codes of French Canada, Egypt and Japan.[2] The Austrian Code enacted in 1811 strikes out an entirely new line.[3] The German Commercial Code (1862–6) marks the beginning of a movement which culminated in the enactment (1896) and the coming into force (1900) of the German Civil Code.[4]

In the meantime codification had found an ample field in the Swiss Cantons. Berne was the first Swiss Canton which codified the Civil Law (1824–30). The Berne Code was to a large extent modelled on the Austrian Code, and in this manner the Austrian Code had an indirect influence on the Code which is the subject of this article. The Codes of the Cantons of Lucerne (1831–9), Soleure (1842–8—revised 1891), and Aargau (1847–55) were modelled on the pattern of the Berne Code, but a system of codification on more modern lines was initiated by the well-known jurist Bluntschli, who was the author of the Zurich Civil Code (1853–5 ;

[1] *The Sources of Law in the Swiss Civil Code.* By Ivy Williams. Oxford: University Press ; Humphrey Milford, 1923.

[2] See on these influences the articles in the *Livre du Centenaire*, on pp. 725 et seq. ; 735 et seq. ; 781 et seq.

[3] This Code was substantially revised by statutes passed in 1914, 1915 and 1916, but the original form and the original arrangement were retained.

[4] See my article in the *L.Q.R.*, vol. xii, pp. 17–35.

revised in 1887). The Cantons of Schaffhausen (1863–5), Zug (1861–75), Nidwalden (1853, 1859), Glarus (1869–74) and Grisons (1862) introduced Codes which followed the Zurich Code in a more or less complete manner. The law of the French-speaking and Italian-speaking Cantons (Geneva, Vaud, Fribourg, Ticino) was to a large extent based on the French Civil Code.[1]

In the meantime the advocates of federal—as distinguished from cantonal—legislation were preparing the way for the unification of Swiss law. An attempt made on the occasion of the enactment of the New Federal Constitution (1874) to transfer the whole field of private law to federal legislation was frustrated by the popular vote, but art. 64 of the said Constitution gave power to the Federation to legislate: (1) on the personal capacity for acts-in-law; (2) on all matters relating to commerce and to dealings with movables (law of obligations including commercial law and the law of bills of exchange); (3) literary and artistic copyright; (4) the enforcement of judgments and bankruptcy law.[1]

The most important result of this extension of federal legislative power was the enactment of the "Swiss Law of Obligations," which came into force on January 1, 1883. This enactment covers a much wider ground than its name implies. It does not merely deal with the general rules of the law of contracts and of torts, and the special rules affecting particular classes of contracts and torts, but it also embodies the whole of the law contained in the first and second book of the French Code de Commerce, and the greater part of the law contained in the German Commercial Code and the German Bills of Exchange Code (Law of Partnership and Companies; Law of Bills of Exchange and other negotiable instruments, etc.). This far-reaching codification of an important part of private law was supplemented by federal Statutes on bankruptcy, patent law, trade marks, copyright and workmen's compensation, with the result that about one-third part of private law was covered by federal legislation. The first impulse to the preparation of a codification of the remaining part of private law was taken in 1884, when Professor Huber was instructed to draw up a comparative statement of Cantonal Private Law. The resulting work (*System und Geschichte des schweizerischen Privatrechts*, 4 volumes, 1886–93) brought about a new change in the Swiss Constitution

[1] See Dr. Reichel's Introduction to the *Kommentar zum schweizerischen Zivilgesetzbuch*, published by Dr. Egger and others, vol. i, p. x.

[2] Competence as to matters of Patent Law was added in 1887.

(1889), by means of which the legislative power of the Federation was extended so as to cover the whole field of private law. Professor Huber was then instructed to prepare the first draft of the Code, which, after having been revised by various committees, was transformed into the Swiss Civil Code.

The Code of Obligations was made a part of the said Code, the first two parts (dealing with the subjects usually comprised under the head of "Law Obligations") having been previously revised and redrafted, while the third part, dealing with commercial partnerships and companies, and with negotiable instruments, remained in its original form. The several federal Statutes dealing with private law and referred to above remain in force by the side of the Code, and it is also intended that the unrevised part of the Code of Obligations should (after having been revised and reconstrued) form the subject of a separate federal enactment. The Swiss Civil Code in the above-mentioned form came into force on January 1, 1912.

In the following pages I propose to state my own views as to the matters discussed by Miss Williams and as to some cognate matters, leaving it to the reader to ascertain Miss Williams' views from her book, which, notwithstanding occasional symptoms of inexperience, is of a highly interesting and stimulating character.[1]

The general arrangement of the Swiss Civil Code (hereinafter referred to as "the Code") has been complicated by the fact that the—partly revised, partly unrevised—Code of Obligations had to be incorporated with it, and that certain transitory provisions as well as the provisions defining the relations between federal and cantonal law—had to be embodied into a separate part—called the "Concluding Part" (Schlussteil) of the Code, which, like the Code of Obligations, is composed of separately numbered articles. This "Concluding Part," in its turn, by art. 59 maintains the provisions as to private international law contained in a federal statute of June 25, 1891, and declares these provisions to be applicable in international as well as intercantonal matters. This Statute may therefore be looked upon as the third Appendix to the Code.

The four parts of the main body of the Code are respectively entitled "Law of Persons," "Family Law," "Law of Inheritance," and "Law of Things," but the first eleven articles of the first book

[1] Some of Miss Williams' observations call for criticism; see Review at the foot of this article.

deal with a number of subjects which have no exclusive bearing on the law of persons, and some of the subjects dealt with in the other articles, such as articles 52–79, dealing with non-commercial corporate bodies and societies, and articles 80–87 dealing with foundations for public or charitable purposes, have no real connexion with the law of persons in the proper sense of the word (commercial incorporated companies and partnerships are dealt with in the Code of Obligations). The rules as to citizenship and domicil and the registration of births, marriages and deaths (dealt with in articles 22–26 and 39–51) are also included in the Code, though not belonging to private law in the strict sense of the word.

The authors of the Code had to contend with one obstacle, which in Germany had been removed by legislation preceding the codification of private law. The organization of the Courts of Law was in Germany determined by federal legislation, and was uniform throughout the German States, whereas in Switzerland all the Courts of Law, with the exception of the Federal Court, are organized in accordance with Cantonal Law. Art. 52 of the "Concluding Part," while preserving this power of the Cantons, requires any supplemental cantonal legislation on this subject necessitated by changes in the law effected by the Code to be submitted for approval to the Federal Council. It may be observed in this connexion that in Switzerland, as in all continental countries, contentious matters of any importance are never submitted to single judges, but always to tribunals consisting of not less than three judges. The expression "the judge," which is often used in the Code, does not imply that the matter in question is to be determined by a single judge.[1]

The "sources of law," which constitute the central subject of Miss Williams' book, are indicated in art. 1 of the Code. I quote this article in the French text, as it is free from certain ambiguities which characterize the German and the Italian versions. In the French version the article reads as follows :

"La loi régit toutes les matières auxquelles se rapportent la lettre ou l'esprit de l'une de ses dispositions.

A défaut d'une disposition légale applicable le juge prononce selon le droit coutumier, et à defaut d'un coutume selon les règles qu'il établirait s'il avait à faire acte de législateur.

[1] In some Swiss Cantons the Courts of First Instance are partly composed of lay judges. Trial by jury in civil cases is unknown in continental countries.

Il s'inspire des solutions consacrées par la doctrine et la jurisprudence." [1]

The several "sources of law" are therefore to be used in the following order. If the matter in dispute is provided for by any provision contained in the Code the relevant provision must be applied; in default of such a provision it has to be ascertained whether any federal or cantonal statutory provision which has remained in force by the side of the Code is available; if this source of law also runs dry "customary law" has to be resorted to, in so far as it affects the points at issue. Where the voice of customary law is also silent the tribunal before which the case is tried must act as legislator, but under the inspiration of the "communis opinio" of jurists, or of authoritative judicial decisions.

The first difficulty which meets a jurist called upon to interpret this article of the Code arises from the fact that cantonal customary law has (subject to certain exceptions provided for in the Code) been repealed by art. 51 of the "Concluding Part," and that as yet no federal customary law is in existence.[2]

This difficulty will no doubt disappear in time, but then a further difficulty will present itself. How is the existence of customary law to be ascertained? It would appear that in this respect also case law and the "communis opinio" of jurists are the only trustworthy authorities. The tribunal called upon to decide a case not provided for by the Code or by separate Statute must therefore appeal to these aids before acting in a legislative capacity, no less than in exercising the last-mentioned function.

This was made quite clear by the form of the draft which the Federal Council submitted to the Swiss Legislature, according to which the judge's legislative powers were only to be exercised if no guidance was to be obtained either from any statutory pro-

[1] In the first paragraph the expression "la loi" means the Code, whereas in the second paragraph the "disposition légale" must obviously include statutory provisions outside the Code which have remained in force by virtue of articles 51 and 60 of the "Concluding Part." In the German and Italian texts the expressions "das Gesetz" and "la legge" are used in both paragraphs, thus concealing the difference in the implication. The expression "il s'inspire" in the third paragraph is also much happier than the corresponding German and Italian expressions, which seem to require a strict adherence to the sources of law indicated thereby. The German text also substitutes the vague word "Überlieferung" (tradition) for the expressions "jurisprudence" and "giurisprudenza" used in the French and the Italian versions, which clearly mean "case law."

[2] Customary law must, of course, be distinguished from customs of trade and intercourse existing in particular localities or in particular branches of commerce, and which may be established by evidence.

visions, or from customary law, or from "approved doctrine and case law." The fear of the "cult of case law" (*Präjudizienkultus*) which is so widespread in German-speaking countries induced the Swiss Legislature to reverse the order and to make "approved doctrines and case law" mere aids to the exercise of the judicial legislative power, instead of retaining them as "sources of law" in accordance with the intention of the framers of the Code.

In denying absolute authority to the judgments of the highest Tribunal the Swiss Code had only adhered to the previous tradition and the general trend of continental opinion. To lawyers who have had opportunities to compare the continental system with the system prevailing in English-speaking countries the advantages of the last-mentioned system appear to be indisputable. In actual continental practice the decisions of tribunals like the French Cour de Cassation, or the German Reichsgericht are not easily dissented from by subordinate Courts, but the fact that the Courts of First Instance are not technically bound by rules laid down by the higher Courts creates an undesirable uncertainty. Where rules laid down by judicial authority are deemed to be inconvenient or unjust, it is better to overrule them by legislation than to leave it to the inferior Courts to follow them, or to disregard them, as the accident of the composition of the tribunal may determine. Where such rules are convenient and just they ought not to be exposed to the disregard of judges whose boldness exceeds their wisdom.

The legislative power conferred on the Swiss tribunal by article 1 of the Code must of course be distinguished from the discretionary powers exercisable in special cases in which they are expressly conferred by the Code. Article 4 specially provides that in all such cases the discretionary power must be exercised "justly and equitably" (*nach Recht und Billigkeit*). This merely means that the discretion must be exercised judicially and not arbitrarily—a rule which obtains in all civilized countries and of which the express enunciation appears unnecessary.

Some of the general provisions contained in the first part of the Code, though not throwing any light on the question as to the effect of the several "sources of law" recognized by the Code, are of interest as illustrating certain of its tendencies and methods of expression; among these articles 3 and 8, which deal with the burden of proof, deserve special mention.

Article 8 declares that, in the absence of any special provision to the contrary, a person claiming a right resulting from an alleged

fact is bound to prove the existence of such fact. This rule appears sound and extremely well expressed;[1] but an exception engrafted on it in article 3 is in my opinion less worthy of commendation. The said article declares that in any case in which the law attributes a particular effect to "good faith" the existence of good faith is to be presumed. This rule is unnecessary in all cases, where the proprietary right of a possessor depends on his good faith; in any such case the person claiming the ownership on the ground of the possessor's bad faith would have to prove the existence of bad faith under the rule laid down by article 8. The position is, however, changed when the possessor of a thing acquired from a person who was not the real owner claims to exercise a right reserved to persons who have acquired the possession in good faith; as, for instance, when a stolen bill of exchange is presented for payment to the acceptor, who, having received notice of the theft, refuses payment. If the holder of the bill is in good faith it will be easy for him to prove his good faith, but in the reversed case it will be extremely difficult for the acceptor of the bill to prove the holder's bad faith. If he fails in his proof the true owner of the bill is deprived of his rights notwithstanding the fact that the holder's good faith is doubtful.

The disputes which the Courts have to decide arise most frequently in circumstances in which one of two innocent parties has to bear a loss created by adverse circumstances. In such cases the maxims as to good faith and justice and equity are of very little advantage. There is no civilized community in which these maxims are not taken for granted.

The brevity of expression which characterizes the Code is quoted as one of its great merits (see, for instance, Dr. Egger's edition of Part I, p. xix), but, as pointed out by Miss Williams (on p. 29), brevity of language does not necessarily "tend to clearness." Several continental jurists have contrasted the diffuseness of language of the German Civil Code with the conciseness of the Swiss text, not entirely to the advantage of the latter.[2] To an English

[1] The first draft of the German Civil Code contained four sentences which in their practical effect, though expressed in a much more detailed form, led to the same result as the rule quoted in the text. In the German Civil Code as finally enacted all rules as to the burden of proof were omitted, but the particular form of the rules of positive law was framed in accordance with a method indicating the distribution of the burden of proof (see Planck's edition of the *German Civil Code*, 3rd edition, vol. i, pp. 48–51).

[2] See Professor Gény's highly interesting article "La technique législative, dans la Codification Civile Moderne," *Livre du Centenaire*, vol. ii, pp. 981–1308, more particularly pp. 1034–6.

lawyer the language of the German Code does not appear as the most extreme form of legal prolixity; the phraseology of the German Code appears simple when compared with the language of many English Statutes; but, while no one can deny that the casuistical detail contained in some of these Statutes is frequently more of a hindrance than of a help to their interpretation, other English Statutes, and more particularly some of the more recent Acts codifying certain branches of the law, may well serve as patterns of completeness and lucidity, far in advance of any of the modern continental Codes.

Miss Williams realizes the deficiency of a Code which leaves so much to judicial legislation, but she says that "there is a consensus of admiration for the sober and scientific way in which the Courts have carried out their duties . . . which is assuring the true success of the Code." Having regard to the shortness of the period of time during which the Code has been in force—being a period of time moreover during which the normal life of all European countries was disturbed in many directions—the evidence on which she has formed this conclusion can hardly be sufficient. The "typical judgments" on various sections to which she refers offer no assistance in this respect, as the reasoning on which they are based is only given in a very summary form.

Neither the question, whether—in the abstract—a codified system of law is preferable to a combination of statute law and customary law as exemplified in British countries and the United States, nor the further question whether a Code stating only principles in outline is preferable to a Code filling in the necessary details, can be usefully discussed in the space of a short article. There are, however, two facts to which I desire to call attention, as they are not sufficiently realized by publicists standing outside of legal practice. The one is that, however popular the language of a Code or Statute may be, the lay reader who relies on the text is apt to be misled. The lay reader does not and cannot realize that the words of a particular section do not stand *in vacuo*, that in order to be properly understood they must be taken as part of a whole branch of law, and that without an understanding of the whole of that branch of the law the words, however clear in themselves, are apt to mislead. The other fact is connected with the proverbial "uncertainty" of the law. The maximum of this uncertainty is necessarily reached in the case of a new Code which, while repealing the former rules of law, gives the new rules merely in outline, leaving the filling in of the details to judicial legislation.

The lawyer who is called upon to advise on a doubtful point refers to the textbooks and commentaries, and in many cases finds that they express mutually opposite opinions. He will, more or less hesitatingly, form his own opinion, but he will only express it to his client with all reserves, and the client will curse the law and the lawyers. No system of law can be devised in which this uncertainty can be entirely avoided; but when, as in British countries and the United States, the rules resulting from the judgments of the highest Courts have the force of law, the uncertainty can be reduced to an appreciable extent. It is undoubtedly the fact that, notwithstanding all protests against the "Cult of Case Law," the authority of decided cases, though not officially admitted, is slowly but surely gaining ground. The Swiss Code, with its express recognition of judicial legislation and with its deficiency of detail in many of its enactments, cannot fail to give further momentum to this tendency.

The object of this article was to deal specially with the characteristics of the Code which form the main subject of Miss Williams' book. The limits of space do not allow me to give a survey of the rules of substantive law which the Code contains, and which are interesting in many ways.

The principal aim of the codification of Swiss Law was the unification of a number of conflicting systems. The fact that this object was accomplished in a comparatively short period of time to the general satisfaction of the populations of the various Cantons is a just source of pride for the Swiss nation and an enduring monument to the perseverance, patience and skill of Dr. Huber and his collaborators.

REVIEW.

The passages in Miss Williams' book calling for criticism are dealt with below in the order in which they appear in the book.

The translation of article 52 of the "Directions for the application and introduction of the Code" (p. 18) is not quite correct and hardly intelligible. The following is a correct translation: "The Cantons shall issue the orders required for this Code, more particularly as to the jurisdiction of the public authorities and the organization of the offices for the registration of Births, Marriages and Deaths for Guardianship Matters and for Land Registration." This article merely refers to a question of organization which *ex necessitate rei* must be left to cantonal arrangement; its import differs *toto cœlo* from the import of article 472 referred to as analogous in character by Miss Williams. The last-mentioned article is of great importance, as it gives a power to cantonal legislation to bring about a material modification of the federal law as to "legitim portions." Miss Williams' translation of the article conferring these powers is misleading, and in one respect inaccurate. It is misleading, because it makes it appear that the Cantonal Authorities have power to direct a modification of the general law in

each particular instance, whereas the article only gives them power to modify the federal law by Cantonal Statute; it is inaccurate, as it leaves out the condition that the testators to which it applies must be citizens of the Canton as well as domiciled at their death within its territory.

The statement on p. 20, to the effect that in actions relating to subject matters of a certain minimum value the Federal Court has concurrent jurisdiction with the Cantonal Courts, overlooks the fact that this jurisdiction only arises if both parties agree to resort to the Federal Court (see s. 52 of the Statute of 1893). On p. 186 the rule on this subject is stated correctly. Section 47 of the Statute of 1893 does not, as stated by Miss Williams, subject the Federal Court to the "control" of the Federal Assembly, but only to the "supervision" (*Aufsicht*) of that body.

Miss Williams frequently refers to matters as special features of the Swiss Code which, from the very nature of things, must play an important part in every system of law, whether codified or not. Thus, it is stated on p. 27 that *bona fides* play an important rôle in the Code, and that this "places unlimited powers in the hands of the judge." Is there any country in which the Courts are not, from time to time, called upon to decide in various circumstances whether a particular act was done in good faith?

On p. 30 reference is made to the fact, stated to be characteristic of the Swiss Code, that a testamentary disposition may, at the testator's option, be made by holograph will, or by formal declaration before a Notary or Public Official. It is hardly necessary to mention that the same liberty of choice exists under the French Code and the Codes derived from it, under the Austrian Code, under the German Civil Code, and probably also under many other systems of law, and that even under the later Roman law the testator had a choice between a "public will" and a "private will."

In the same way the fact that "there are various forms of real security" (referred to on p. 31) is by no means an exclusive characteristic of Swiss law.

The same criticism applies to the observation as to the alleged permissive character of the rules of the Swiss Code, which is supported by the statement that under these rules a person injured in his rights *may* (in the instances mentioned by Miss Williams) claim to be entitled to certain remedies. There is no system of law which *compels* a person to exercise his rights. The compulsion which the Swiss Code, no less than other systems of law, provides affects the person violating rights and him alone. It is quite impossible to discover an analogy between the option conferred on an injured person to use or abstain from using the remedies conferred upon him by the law, and the discretionary powers given to the Courts by various sections of the Code, and yet Miss Williams (on p. 31) refers to both matters as proofs of the "permissive" character of the Code.

The provisions of the Code, as regards powers of the Courts in respect of the appointment of guardians or curators of lunatics, feeble-minded persons or prodigals (on p. 32), which are also referred to as special features of the Swiss Code, are common to all continental systems of law and within certain limits exist in every system of law.

The variety of the grounds of divorce which (on p. 137) is in its turn mentioned as a special characteristic of the Swiss Code can also be discovered in many other systems of law. The Prussian Landrecht and the original article 233 of the French Civil Code contained rules of much wider import, and the provisions contained in s. 115 of the Austrian Code with reference to the divorce of non-Catholics are also of the widest character (persistent mutual dislike being one of the grounds). The grounds of divorce in the Swiss Code are almost identical with those enunciated in the German Civil Code.

The author's obsession with the idea as to the peculiarity of the provisions of the Swiss Code in respect of the discretionary powers of the Courts also colours her interpretation of the well-known article 2 which declares that "the obvious abuse of a right is not protected by the law." She says (on p. 32) that this in theory "places in the hands of the judge the control over all human actions: it may therefore at

any time have far-reaching effects on the liberty of the subject." It is hardly necessary to point out that the rule in question only carries out the maxim of Roman law: "*sic utere tuo ut alienum non lædas*"; that this maxim was recognized as well in the later Roman law as in German law (see the references in Dr. Egger's Edition of Part I of the *Swiss Code*, on p. 11), and that in its practical effect it is identical with the rule laid down by s. 226 of the German Civil Code. Under the rule of later Roman law a claim based on an abuse of rights could be met by the *exceptio doli*, and the effect of the provision now commented on is simply that the defendant in an action may plead that the claim asserted by the plaintiff constitutes "an abuse of rights." The burden of proof in such a case is imposed on the defendant. If he succeeds the plaintiff's action is dismissed, but neither the plaintiff's nor the defendant's liberty is endangered in any event.

The actual mistakes in the book are few, and mostly of minor importance. The most serious error occurs with reference to the interpretation of article 28 (pp. 56 and 92), which suggests that this article refers to injury done to personal "interests."

The relevant words of the article appear as follows in the French version:

"Celui qui subit une atteinte illicite dans ses intérêts personels peut demander au juge de la faire cesser."

The expression "intérêts personels" (which in the German version is rendered by "persönliche Verhaltnisse," and in the Italian version by "rapporti personali") in this context has an implication differing *in toto* from the implication of the English expression "personal interests," which expression obviously includes pecuniary and proprietary interests. The rights intended to be protected by this article are rights affecting *the person as such*, as distinguished from proprietary and pecuniary rights, more particularly the right to life, health, physical integrity, personal liberty, freedom from insult and slander, etc. The article protects these rights, but has no reference to the remedies in case of the violation of proprietary or pecuniary rights.

A most extraordinary misapprehension is disclosed on p. 116, where the author states that the old Code of Obligations "had been interpreted to exclude an action for damages, for it was held that this could only lie for injuries to property." The old Code of Obligations contained in s. 50 a general provision declaring every person who unlawfully inflicts damage on another, whether intentionally or negligently, liable to compensate such other; s. 51 left the assessment of the damages to the discretion of the judge; s. 52 conferred the right to damages in the case of the infliction of death; ss. 53 and 54 conferred the right to damages in the case of unlawful wounding; s. 55 declared that *in the event of a person being injured in respect of his person by other unlawful acts the Court may award damages without any proof of the fact that the plaintiff has suffered pecuniary loss*. It is, of course, inconceivable that any Swiss Court should have declined to award damages in any case where these sections of the Code of Obligations had to be applied.

On p. 84 it is stated that "the Old Prussian Code did contain a clause *similar to section 5 of the Code Napoléon to the effect that no account was to be taken of the decisions in earlier cases*." It is also stated (on p. 74) that the Code of Geneva (which is entirely based on the French Code) "provides that judges are forbidden to decide cases submitted to them *according to general rules and principles*." It is quite true that under the original provisions of the Prussian Landrecht case law could not have been resorted to by the Courts, but article 5 of the French Civil Code contains no similar provision. The said article says: "Il est défendu aux juges de prononcer par voie disposition générale et règlementaire sur les causes qui leur sont soumises." The object of this article was to prevent the Courts from arrogating to themselves the power of general legislation which was exercised by the Parlements under the *ancien régime*. (See Aubry and Rau, *Code Civil*, 5th Edition, vol. i, p. 188.) The clause obviously did not take away the powers of the Courts to be *guided* by case law, or by "general rules and principles."

The criticisms which I felt it my duty to include in this note are not intended to indicate any want of appreciation of the merits of Miss Williams' work.

THE TENDENCY TO UNIFICATION OF LAW IN THE UNITED STATES, 1868–1922.[1]

[*Contributed by* J. Arthur Barratt, Esq., K.C.]

Professor Lambert in a contribution to the *Bulletin* of the French Society of Comparative Legislation shows a grasp of the complicated system of law in the United States somewhat unusual amongst foreign lawyers ; and he comes to the conclusion that, on the whole, the efforts made in the last half-century to bring about uniformity of law throughout the country have had but ill success and gives what he thinks are the reasons therefor.

The article may be summarized as follows :

The American Bar Association has been endeavouring for some years through its Committee on Uniform State Laws to frame model Statutes on general subjects of Commercial Law, *e.g.* Negotiable Instruments, Warehouse Receipts, Bills of Lading, etc., and to secure their enactment by the various State Legislatures. It has had notable success in the case of the Negotiable Instruments Law, but less as to the others.

Professor Lambert asks how it is that the Federal authorities, themselves, have not in a more effective fashion undertaken the work, and then shows what he considers are the obstacles.

Firstly, he mentions " constitutional obstacles," and shows that while the Federal Courts function in every State and adjudicate on practically the same questions (except those specially reserved to the Federal Courts, such as Patents, Bankruptcy, etc.) as the State Courts they are unable to establish a Federal Common Law by their decisions, because they are bound by a fundamental principle of Constitutional Law, viz. the " rule of conformity."

Under this rule the Federal Courts are bound, in the various States in which they exercise jurisdiction, to apply the local laws and to conform to the interpretation of them made by the highest Court of the particular State. But that, nevertheless, this rule has

[1] *Bulletin mensuel de la Société de Législation comparée*, Nos. 4, 5, 6, Avril–Juin 1923 (Librairie Générale de Droit et de Jurisprudence ; Paris), p. 135 f.

not prevented the Federal law from adapting itself sooner or later to the social life of the country to the detriment of the juridical autonomy of the States. And one of its methods of so doing is a somewhat wide construction of important Acts of Congress.

Secondly, he thinks Art. 14 of the Constitution, granting equal civil rights to all, has been practically abrogated by judicial construction. Section 5 of the Art. gave Congress power " by appropriate legislation " to enforce it within the limits of any State. The Southern States objected, and the United States Supreme Court held that the States still retained their original power to protect citizens in their civil rights; the Federal and State powers existing concurrently in every State.

Thirdly, legislation relating to commerce between the States has trenched upon State right to regulate such commerce within the State. Through the " Act to Regulate Commerce," and the appointment of the Interstate Commerce Commission, large powers have been granted to regulate freight and passenger rates, etc., for interstate traffic, which necessarily affect rates on such traffic within the State.

Judicial construction of Federal Acts relating to illegal trusts and combinations have exerted Federal powers within the States, *e.g.* preventing the illegal abuse of patent rights, the control of prices for resale of goods, conflicts between Capital and Labour; and declaring trade unions suable and their funds attachable. These powers could only exist through the constitutional right of Congress to regulate commerce between the States, which constitutes so large a part of the commerce of the country.

The creation of another body, the Federal Trade Commission, with extensive powers of investigation and control over interstate commerce (except railways and banking), is a development of Federal law at the expense of the autonomy of the States. Out of the creation of this body there has developed a general jurisprudence of " Unfair Competition."

Fourthly, the repercussions of the war. The Government control during the war over railways, food-stuffs, prices, laws of labour, conditions of work, sale of liquor; the appointment of special bodies with Federal powers, such as the Council of National Defence, the National Labour Board, the Adamson Law 1916—prescribing hours of work for railway-men, though a breach of their contracts with the Company—were many of them attacks on the legislative autonomy of the States, but necessary for national defence. Never-

theless, they have led to an extension of Federal powers within the States, and have led to still more extensive legislation since the war —such as the National Prohibition Act ; the Acts creating the R.R. Labour Board, the R.R. Wage Commission, the R.R. Boards of Adjustment, etc.

Since the demobilization of Federal bodies controlling food-stuffs and the return of competition a new Federal Legislation has arisen to prevent excessive speculation, price control and unfair control evidenced by the Packers and Stockyards Act, 1921, giving the Secretary of Agriculture extensive powers of supervision over the operations of the great trusts.

The United States Supreme Court has held these Acts against the abuse of speculation in meat and cattle to be valid.

And the Courts have, little by little, been obliged to relinquish their constitutional objections to the Federal delegation of the powers of regulation of trade and the concession of quasi-judicial functions to federal bureaux.

The power of surveillance and revision, however, existing in those Courts over their administrative and jurisdictional acts, has had a unifying influence.

Still the concept of interstate commerce is not capable of indefinite extension, and Congress has often been obliged to have recourse to other instruments—for example :

Fifthly, " Législation par ricochet," *i.e.* indirection. Thus Congress has indirectly achieved uniformity which it would be unconstitutional to have done directly, notably in three ways : by

(1) Laws regulating interstate commerce—particularly railroads.

(2) The Postal power—prohibiting the transmission by post of things either dangerous in themselves or prejudicial to the moral or physical health of the people, *e.g.* obscene publications, films, lottery tickets, etc.

(3) The taxing power—by compelling the observance of certain prohibitions or obligations (which the Government had no constitutional power to impose directly) under the penalty of a tax.

By the employment of these three methods Congress has for fifty years " in fact extended its legislative activities beyond the limits imposed by the Constitution." The following are instances :

The Lacey Act forbidding the transport of wild birds killed in violation of State laws ; the Pure Food Act against fraud as to nature and source of food ; the Meat Inspection Act ; the Maine Act

against immoral traffic in females; the Grain Standards Act; Cotton Fixtures Act, regulating sales of wheat and cotton; the Child Labour Tax Law imposing a 10 per cent. tax on product of mines or factories where certain child labour is used.

Sixthly, legislation by constitutional amendments of which the Prohibition Amendment and the Female Suffrage Amendment are notable examples.

By such instruments advancing the nationalization of law any juridical reform can be instituted by a public opinion which can persuade two-thirds of the members of both Houses of Congress and three-fourths of the State Legislatures.

The year 1868, when the 14th amendment was passed, and 1919, when the 18th was passed, constitute two great epochs in the history of American law—the former the beginning and the latter the accomplishment of " juridical centralization."

Professor Lambert thinks that during this half-century a " new conception of government " was born, and that this tendency toward centralization evidenced by judicial construction, indirect legislation, and constitutional amendment constitute really " the new Constitution of the United States "—a new American nationality or nationalization of law, as opposed to State localization of law. And he considers it a distinct invasion by the Federal law of the province of independent State law. And he wonders whether this will not result in future, instead of an association of States guarding their independence, in a federation which will not be more than the grant of a large self-government to provinces of the same country.

Seventhly, uniform legislation—reasons for its non-success.

The American Commission on Uniform State Laws which has been at work since 1890 has had two " half successes "—the Uniform Sales Act, 1906 (based on the English Sale of Goods Act), and the Uniform Bills of Lading Act, 1909—and two complete successes, the Negotiable Instruments Law, 1896, and the Warehouse Receipts Act, 1906, which have been adopted by nearly all the States.

These were only in the domain of Commercial Law. The Commission's efforts were futile when it essayed uniformity in the domain of family law—marriage and divorce—and also real property law—the Uniform Land Registration Law, an adaptation of the Torrens system. It also encountered marked checks in endeavours to have adopted the Workmen's Compensation Law and the Uniform Child Labour Law.

Has the Commission obtained even in commercial law a uni-

formity as complete as that which would result from Federal Legislation ? he asks, and answers " No."

As to the successful Negotiable Instruments Law, he points out that thirty-five States have accepted it only conditionally. And while certain States have only altered one or two sections, some others, like Illinois and Wisconsin, have amended, respectively, 31 and 26 of the 198 sections.

This " indirect method of juridical centralization " has revealed another infirmity.

The Courts of the States accepting the model law have not always given a uniform construction to the law, so that diversities of legislation, which it was desirable to avoid, have given place to diversities of jurisprudence. " How is this to be explained ? " he asks. " By thinking of sabotage of the local Courts ? No ! "—but by the nature of the judicial institution or by its functioning in actual practice.

A text is valid only in each place as a law of the State by force of local sovereignty, and it undergoes in being framed in the juridical tradition of each State certain refractions of diversity, all the more inevitable that each sovereign judicature is tempted to interpret it in conformity with the particular interests and desires of its citizens.

The commission has considered measures to counteract this absence of uniformity. But the question seems insoluble.

But just as diversity of types of Statutes cannot be eliminated without impinging on legislative autonomy of the States, so diversity in their application cannot be avoided otherwise than by the limitation of the autonomy of the judicature of the States and the establishment of some law controlling the manner in which they apply the uniform Acts—such as the United States Supreme Court.

Eighthly, lessons of International Order from American experience.

The author points out that the bureau international du travail in the first four years of its existence has accomplished more legislative reforms than the Commission of the American Bar Association in the thirty-three years of its existence. He thinks this is due to the fact that the former organization of employers and workmen by its propaganda, etc., is better equipped than any legal body to bring pressure on Governments necessary to realize the desired reforms.

He thinks also that the success of the Negotiable Instruments law is largely due to the co-operation of large banking interests, and

that model contracts and rules and regulations in use by great commercial concerns have contributed much more to the unification of the law of commercial sales than the Uniform Sales Act.

He thinks also that certain social factors have brought about propagation of certain laws in favour of illegitimates and of women and children in spite of the opposition of jurists. And also that labour organizations and economic factors have brought about reforms in the Labour laws.

The author also thinks that Pan-American conferences and organizations like the Inter-America High Commission will bring about agreements between the commercial laws of North and South America ; and that internationally the use in Europe of printed forms of contracts such as the English c.i.f. and other contracts by great trusts and business interests, together with the adoption of the York and Antwerp Rules, the formation of International Chambers of Commerce and Courts of Arbitration—will all have their influence in bringing about greater uniformity of commercial laws throughout the world.

These difficulties pointed out by Professor Lambert in bringing about uniformity of law have been receiving the earnest attention of students of the United States constitutional law for a long time. But the exertion of Federal powers within the States has not in practice been looked upon by the States as an infringement of their rights. For they are themselves much concerned to bring about uniformity of law, and are not only content with the exercise of these Federal powers, but in fact do what they can to aid in their enforcement, by passing identical Statutes where the Federal powers cannot be efficiently exercised without the aid of the State police power.

A notable example of this is the Federal Prohibition Law. The Federal Volstead Act provides machinery for enforcing the constitutional amendment. But the number of Federal officials in any State is totally insufficient adequately to enforce the law. Hence several States have passed Statutes identical with the Volstead Act in order to bring the entire State police powers to the aid of the Federal authorities in enforcing the law. But some of these States have recently abrogated their Statutes passed for this purpose, not because they deemed the Federal law an infringement of State prerogatives, but because of great public opposition to the law.

Again, the delegation of Federal powers to Commissions has been generally approved by the States, it being recognized that

this was the most efficient method of attaining uniformity in administration.

It has been fully recognized that the Constitution is not a rigid, but an elastic instrument adaptable to the ever-changing needs of modern civilization—be it by actual amendment, or by judicial construction.

The so-called "législation par ricochet," and by constitutional amendment, are welcomed rather than opposed, as being the best methods available under modern conditions to attain a certain uniformity.

The States do not consider these methods as attacks upon their sovereignty, but on the contrary readily yield (if need be) such portion of that sovereignty as is felt to be necessary to bring about the desired ends.

War legislation has shown how effective for uniformity a general Federal control may be. And the States are prepared to extend this control (within limits) to peace times. For, after all, it is the States themselves, acting through their representatives in Congress, who pass these Federal Statutes after due consideration and experience of the actual working of previous Statutes.

It is the very non-success in securing the passage of uniform laws by State legislatures which has driven reformers themselves to advocate these extensions of Federal powers either through direct legislation, or indirectly by judicial construction, the application of the taxing power or by means of regulation of interstate commerce.

As to the difficulty created by the diversity of judicial construction of the model Statutes like the Negotiable Instruments Law, this is inevitable in a country where there are forty-eight independent State jurisdictions, with literally thousands of judges, and hundreds of Courts, many of which are farther apart than London is distant from Quebec, Petrograd or Constantinople.

The best hope for uniformity seems to rest in the extension, not the contraction, of Federal legislation within the limitations of the Constitution.

THE DEFENCE OF THE REALM LOSSES COMMISSION AND THE WAR COMPENSATION COURT.

[*Contributed by* D. Du B. Davidson, Esq., *Secretary to the War Compensation Court.*]

The history of compensation during the war resembles that of most other war activities in being a series of improvisations. So far as can be seen, no consideration had been given to the question prior to the outbreak of war, except as regards one aspect of it. This aspect was that which, though not pecuniarily the most important, most intimately affected the life of the ordinary citizen and for that reason subsequently became not only the starting-point but the determining factor in the evolution of the system of compensation which was ultimately adopted—the question of taking accommodation for the housing of troops. Prior to 1909 it had been assumed that the problem of accommodating troops in the United Kingdom in the event of hostilities could be solved by the billeting powers under the Army Act, but in 1909 the question was further considered by the General Staff of the War Office, who inserted a new sub-section, 108A, in the Army Act for that year, by which the existing billeting powers were extended to include the Territorial forces in the event of their embodiment, "His Majesty by order distinctly stating that a case of emergency exists." The possibility, however, of the numerous other forms of compensation, which are necessitated by the exigencies of modern war, had not been envisaged, and it will be found that the actual steps for the assessment of such compensation were only taken haltingly and as each aspect of the general problem forced itself upon the attention of the authorities.

Constitution of the Commission.—The immense expansion, however, of the armed forces of the Crown, which resulted on the outbreak of war, speedily brought home to the Authorities the fact that the payments under the billeting system, though apparently inconsiderable when applied to a small force, would become ruinous when applied to the new armies. They were, therefore, partly superseded in practice by negotiated rentals for the occupation of land or buildings, but even upon this basis it became clear that the hasty bargains which were thus driven for urgent accommodation would place a great burden on the State. At the same time, the question of compensation for damage caused by the exercise of the Defence of the Realm powers became acute, and the matter was discussed

at length in the House of Commons on March 10, 1915, during the Debate upon the Defence of the Realm (No. 2) Bill. Proposals were put forward by the Government for the constitution of a Committee to formulate principles for the consideration of Parliament. In the course of the discussion, however, a suggestion was made by Mr. H. E. Duke, K.C.,[1] then member for Exeter, in which he laid stress upon the principle of immanent domain, and suggested that the burden of costly arbitration and litigation which might arise from any statutory scheme of compensation could be obviated by setting up a Commission "to ascertain what payments in its opinion ought to be made *ex gratia* by the Crown in relief of the burdens which the war has thrown upon the individual citizen." This proposal commended itself to the House of Commons and to the Government.

Terms of Reference and their Interpretation.—The Defence of the Realm Losses Commission was accordingly set up by the Royal Warrant of March 31, 1915:

> To inquire and determine, and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds to applicants who (not being subjects of an enemy State) are resident or carrying on business in the United Kingdom, in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in the defence of the Realm.

Mr. Duke was naturally the first Chairman of the Commission and his colleagues were Sir James Woodhouse,[2] formerly M.P. for Huddersfield and subsequently a member of the Railway and Canal Commission, and Sir Matthew Wallace,[3] formerly President of the Scottish Chamber of Agriculture. The task of the Commission was to interpret its terms of reference in dealing with the various classes of claims for compensation which were made before it. The method in which it interpreted those terms is set out in its five Reports, and most clearly in its First Report (Cd. 8359, published in 1916). Taking the clauses of these terms separately we find:

(*a*) That it declined to consider any claim which was *otherwise provided for* in the sense that the claimant[4] had or claimed to have any rights enforceable in a Court of Law under any statutory enactment or under any agreement to which the Crown was party.

(*b*) It interpreted the words *direct loss and damage* in the sense that it was not empowered to award compensation in respect of loss

[1] Now the Right Honourable Sir Henry Duke, President of the Probate and Divorce Court.

[2] Subsequently created Baron Terrington of Huddersfield.

[3] Now Sir Matthew Wallace, Bart.

[4] Second Report, Appendix A, No. 2; Fourth Report, Appendix A, Nos. 2, 7, 9, 12.

arising through the enforcement [1] of any order or regulation of general application, but that compensation could only be awarded to persons whose property or business had been the subject of a direct interference [2] such as between subjects would have given cause of action for damages. Similarly it held itself unable to award compensation in cases where the loss or damage was due [3] simply and solely to the existence of a state of war without any interference on the part of the Crown, and also in those cases [4] where the interference by the Crown was not directly with the property or business of the claimants, but with the property or business of other firms or individuals with whom they had business connexions which were adversely affected by such interference.

(*c*) It interpreted the words *in reason and fairness* as words of limitation of amount or *quantum* of the award and not of expansion, while it specially applied them to those few cases where the action by the Crown was taken for purposes of public defence upon grounds arising out of the conduct of the claimants themselves, which rendered it necessary for the public security that their legal rights should be infringed.

(*d*) It further applied the words *direct and substantial loss and damage* to cases where the loss was due to the general condition of affairs in a locality, and had not been aggravated by the interference, *e.g.* where unoccupied houses or undeveloped building land were occupied for military purposes without loss to the owner other than that due to the pre-existing conditions. It reserved, however, the further consideration of many such cases to meet the possibility of a change of circumstances which might make the continued occupation the cause of loss and to admit of the determination of a sufficient payment to the owner for reinstatement.

(*e*) These words were equally applied to rule out [5] claims for loss of pleasure or amenity only.

(*f*) A further example of this general principle is to be found in the case of the occupation of premises where a business or undertaking was found to have been carried on at a loss, and be capable only of being so carried on during the material period, as in the case of some municipal undertakings and of some charitable institutions, where the only payment which was awarded was in respect of any additional loss due to the occupation.

Requisitions of Goods and Materials.—The Commission had further before it two rather special types of claims for compensation, which

[1] First Report, Appendix, Nos. 1, 2, 3, 8; Second Report, Appendix A, No. 1; Third Report, Appendix A, No. 11; Fourth Report, Appendix A, No. 1.

[2] Second Report, Appendix A, Nos. 5, 9; Third Report, Appendix A, Nos. 2, 4; Fourth Report, Appendix A, No. 10; Fifth Report, Appendix A, No. 1.

[3] First Report, Appendix, No. 4.

[4] First Report, Appendix, Nos. 5, 6, 7; Second Report, Appendix A, No. 3; Third Report, Appendix A, Nos. 1, 12.

[5] First Report, Appendix, No. 10.

necessitated a special application of the principle of assessment of direct loss or damage. During the war a very large number of requisitions of goods and materials took place under the provisions of Regulation 2 B of the Defence of the Realm Regulations. That regulation gave power to the requisitioning Department to settle claims by agreement, providing that, in default of agreement, the claims should be decided by the Commission. It became, therefore, necessary for the Commission to apply to these cases, which represented very large sums of money, the principles of that Regulation, which provides that regard need not be had to the market price, but shall be had—

(*a*) If the goods are acquired from the grower or producer thereof, to the cost of production and to the rate of profit usually earned by him in respect of similar goods before the war, and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case ;

(*b*) If the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case ; so, however, that if the person from whom the goods are acquired himself acquired the goods otherwise than in the usual course of his business, no allowance, or an allowance at a reduced rate, on account of profit shall be made.

It will be observed that a novel measure of compensation is introduced by this limiting provision, while further, the regulation provides that, where the sale of the goods requisitioned is prohibited at a price above any price fixed under an order made under the Defence of the Realm Regulations, the compensation to be assessed shall not exceed the price so fixed.

Reinstatement of Land or Premises.—At the end of the war the Commission received a number of claims in respect of reinstatement of land or premises occupied. In the case of land, it was at once confronted with the problem of what constituted the claimant's loss and eventually arrived at the decision that actual reinstatement should be carried out wherever it was practicable, and the more economical course to adopt ; but that where the cost of so doing would substantially increase the charge on public funds, the loss should be ascertained upon the basis that it ought not to exceed what would be fairly assessable in respect of the full value of the areas damaged, if the owner had been entirely expropriated from them, a due regard being had to all the circumstances, and particularly to the inclusion of a fair sum for any severance damage, and to such injurious affection, if any, of what was retained by the claimant.[1]

Claims by Subjects of Enemy States.—The Commission also undertook, in the course of its labours, to act as an advisory body to the

[1] Fourth Report, Appendix A, No. 11.

Treasury in cases where claimants would be disqualified from making a claim by the fact that they were subjects of an enemy State. It heard such claims and made advisory reports upon them, based strictly upon the principles laid down in its warrant of appointment.[1]

Defence of the Realm (Licensed Trade Claims) Commission.—Meanwhile, the passing of the Defence of the Realm (Amendment) (No. 3) Act [2] in 1915 raised the problem of compensation for the acts of the Central Control Board (Liquor Traffic) under the powers conferred by that Act and the Regulations made thereunder. Accordingly on August 2, 1915, the Government set up another Royal Commission, styled the Defence of the Realm (Licensed Trade Claims) Commission, to determine what sums (in cases not otherwise provided for) ought, in reason and fairness, to be paid out of public funds to applicants, who (not being subjects of an enemy State) were resident or carrying on business in the United Kingdom, in respect of direct and substantial loss incurred by them by reason of interference with their property or business in the United Kingdom through the exercise by the prescribed Government authority of its powers under the Defence of the Realm (Amendment) (No. 3) Act, 1915. This Commission was divided into a Southern Division to deal with England and Wales, and a Northern Division to deal with Scotland. Mr. Duke and Sir James Woodhouse were both members of the Southern Division, assisted by Mr. E. C. De Peyer, while the Northern Division consisted of Lord Dunedin as Chairman, assisted by Messrs. A. Mackay and J. M. MacLeod.

The work of this Commission was, however, considerably less onerous than that of the Defence of the Realm Losses Commission. The bulk of the interferences of the Central Control Board, which gave rise to claims, were in the nature of permanent acquisition of licensed premises, and considerable opposition was manifested by the licensed trade to the assessment of compensation in such cases on the basis of direct and substantial loss. The legal position was tested by an action brought by the Cannon Brewery Company, Limited, in the Chancery Division, where, on July 31, 1917, Mr. Justice Younger decided that the plaintiffs were entitled to compensation to be assessed under the Lands Clauses Acts.[3] This view was upheld by the Court of Appeal, and the case went to the House of Lords, where, on May 30, 1919, the previous decision was upheld.[4] In the result of the decision of the House of Lords, the numerous outstanding cases of compensation for permanent acquisition were settled by agreement without reference to the Commission.

The basis upon which the Commission proceeded in other cases is set out in its report (Cmd. 1265) issued in 1921, from which it will be seen that it followed strictly upon the same lines as those set out in the First Report of the Defence of the Realm Losses Commission. The

[1] Paragraph 4, Third Report; Paragraph 3, Fourth Report; Paragraph 4, Fifth Report.

[2] 5 & 6 Geo. V, ch. 42. [3] [1918] 2 Ch. 101. [4] [1919] A.C. 744.

application of these principles, however, involved certain novel points early in the Commission's sittings. It considered and rejected a claim for loss due to the restriction of hours during which intoxicating liquor could be sold on the ground that the loss complained of arose out of the operation of orders of general application.[1] In several instances during the war the Central Control Board closed licensed premises for the sale of intoxicating liquors for a certain period, on the ground of some breach of their regulations. At the hearing of the first claim brought before it in such a case the Commission was handicapped by the refusal of the Control Board to appear, and decided that both the owners and the licensee in such cases were entitled to compensation.[2] At a later date, however, the same point was argued before it by the Attorney-General on behalf of the Crown, and it reversed its previous decision as regards the owners, holding that, in such cases, the interference complained of, although directly affecting the business of the licensee, only indirectly affected the business of the owners of the premises.[3]

During the course of the Commission's existence Sir James Woodhouse was appointed to be Chairman on Mr. Duke's resignation, and Mr. Edward Shortt, K.C., was appointed to be a member as from September 12, 1916, until his appointment as Chief Secretary for Ireland in June 1918, while, on Lord Dunedin's resignation on February 8, 1916, Lord Hunter was appointed Chairman of the Northern Division.

Petitions of Right.—The basis of direct and substantial loss as the measure of assessing compensation did not fail to arouse considerable opposition in the work also of the Defence of the Realm Losses Commission. At an early stage a Petition of Right was presented in the case of the Shoreham Aerodrome, known, owing to the necessity for secrecy which prevailed at the time, as *In re* a Petition of Right (31 *The Times* L.R. 596; 1915, 3 K.B. 649). In this case the suppliants claimed compensation for the occupation of their property by the Crown. The case was decided against the suppliants by Mr. Justice Avory, whose decision was confirmed by the Court of Appeal. When, however, the case reached the House of Lords in July 1916, it was eventually compromised after three days' hearing. The weakness of the Crown's legal position was thus disclosed, and a village Hampden was soon forthcoming in the person of Mr. (now Sir Arthur) Whinney, who, in his capacity as Receiver and Manager for the Debenture-holders of De Keyser's Royal Hotel, Limited, presented a Petition of Right in February 1917, arising out of the occupation of that hotel by the Crown in the spring of 1916. Mr. Justice Peterson, considering that he was bound by the Court of Appeal in the Shoreham Aerodrome case, dismissed the Petition, but the Court of Appeal by a majority (the then Master of the Rolls and Lord Justice Warrington, Lord Justice Duke dissenting) held that the suppliants were entitled to a fair rent for use and occupation of the hotel by way

[1] Appendix A, No. 1. [2] Appendix A, Nos. 2 and 3.
[3] Appendix A, No. 4.

of compensation under the Defence Act, 1842.[1] The Crown appealed against this decision, which was, however, confirmed by the House of Lords on May 10, 1920.[2]

Indemnity Bill.—This decision, which may justly be regarded as epoch-making, had been intelligently anticipated by the advisers of the Crown, and on April 15, 1920, an Indemnity Bill had been introduced in the House of Commons. This Bill encountered unexpectedly widespread opposition, and after this had been clearly manifested on the Second Reading the Government promised certain amendments which should give effect to the decision of the House of Lords in the De Keyser case. The Bill was then referred to a Select Committee of the House of Commons, and when it returned to the House on the Report stage it had assumed the appearance of a typically English compromise between the general desire to give effect to the vindication contained in the De Keyser case of the subject's right to compensation and the recognition which had been forced upon the critics of the Bill of the crushing burden which would be placed upon public funds if compensation in all cases of interference were to be given upon the basis applicable to a transaction as between subjects in time of peace. The passage of the Bill was then comparatively uneventful, and it received the Royal Assent on August 16, 1920.[3]

Two sections of the Act are specially pertinent to the question of compensation. Section 2 provides that any person not a subject of an enemy State (other than the owner of a requisitioned ship, whose case is dealt with by the Admiralty Transport Arbitration Board constituted under the Royal Proclamation of August 3, 1914) who has incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise, or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to compensation therefor. This compensation was to be assessed upon three different bases according to the type of claim.

(*a*) Where any special principle for assessment of compensation was contained in any regulation or order under the Defence of the Realm Acts, the compensation was to be assessed in accordance with that special principle; this proviso referred primarily to Regulation 2 B of the Defence of the Realm Regulations;

(*b*) Where the claimant, apart from the Act, would have had a legal right to compensation effect was to be given to that right; this proviso embodied the effect of the decision in the De Keyser case, but words of limitation were added which provided (i) that the claimant was not to have any right to compensation for any indirect loss, and (ii) that the Tribunal was to have regard, in assessing the compensation, to the

[1] [1919] 2 Ch. 197. [2] [1920] A.C. 508. [3] 10 & 11 Geo. V, ch. 48.

amount of the compensation to which, apart from the Act, the claimant would have been legally entitled, and to the existence of a state of war, and to all other circumstances relevant to a just assessment of compensation ;

(*c*) In all other cases the compensation was to be assessed in accordance with the principles adopted by the Defence of the Realm Losses Commission, which were further summarized in Part II of the Schedule to the Act.

Provision was made for the reopening of any claim which had been disposed of by award or agreement or rejected prior to the introduction of the Indemnity Bill on April 15, 1920, but only on the leave of the Tribunal concerned, the Tribunal only to grant such leave on proof of a material change of circumstances or new evidence not previously available being adduced.

War Compensation Court.—Except in cases where any special Tribunal was prescribed under any of the Defence of the Realm Regulations and in cases falling within the jurisdiction of the Admiralty Transport Arbitration Board, the Tribunal for assessing compensation was to be the Defence of the Realm Losses Commission, which was henceforth styled the War Compensation Court, and divided into two divisions, one dealing with all claims other than those in respect of interference with property or business in Scotland, and the other dealing with claims in respect of interference with property or business in Scotland. A judge of the High Court was to be President of the Court and a judge of the Court of Session to be President of the Division dealing with Scottish claims. A right of appeal upon a point of law was given to the Court of Appeal in England, and to the Court of Session in Scotland, the decision of those Courts, subject to leave granted by them, being subject to appeal to the House of Lords.

A time limit was imposed under which notice of the claim was to be given to the Tribunal in such form and manner as the Tribunal might prescribe within one year from the termination of the war or the date when the transaction giving rise to the claim took place, whichever might be the later. The War Compensation Court accordingly inserted a notice in the *London Gazette* of September 2, 1921, fixing the final date for the submission of claims as August 31, 1922, being one year from the date officially fixed for the termination of the war. It will, however, be observed that the wording of the clause imposing the time limit is somewhat ambiguous, and no final decision has yet been given as to its interpretation.

The Court was empowered to take evidence on oath, which had not been within the power of the Defence of the Realm Losses Commission, and the provisions of the Arbitration Acts were applied as regards the attendance of witnesses and the production of documents. The Court was further given complete discretion as regards the assessment of costs.

An important saving clause (Section 3) provided that the application of

the Defence of the Realm (Acquisition of Land) Act, 1916,[1] the Acquisition of Land (Assessment of Compensation) Act, 1919,[2] and the Corn Production (Amendment) Act, 1918,[3] should not be affected in any case where, apart from the Indemnity Act, any of those Acts would apply. The position thus created as regards the jurisdiction of the War Compensation Court for the period subsequent to August 31, 1921, the official termination of the war, was one of some ambiguity upon which no authoritative decisions have yet been given.

Members of the Commission.—During the course of the Defence of the Realm Losses Commission Mr. Duke resigned his chairmanship on appointment to be Chief Secretary for Ireland, and was succeeded by Sir James Woodhouse. Mr. E. Shortt, K.C., was also appointed to be a member of the Commission until his resignation in June 1918, upon appointment to be Chief Secretary for Ireland. During the interval the Commission was further strengthened by the addition of the Right Honourable Laurence Hardy, M.P., in September 1917, and Mr. W. F. Hamilton, K.C., in March 1918, while Mr. Shortt's place was filled by the appointment of the Honourable William Watson, K.C., M.P. Lord Terrington, who had been seriously ill for several months, and Mr. Laurence Hardy resigned prior to the passing of the Indemnity Act, and Mr. Watson resigned on that date. This left only two members of the Commission, namely, Sir Matthew Wallace and Mr. Hamilton, and two additional Commissioners were appointed, the Honourable Sir Francis Taylor, K.B.E., K.C., Judge of the Court of Passage, and the Right Honourable Sir Plunket Barton, Bart., K.C., a retired judge of the High Court in Ireland. The Presidents appointed were respectively Mr. Justice A. T. Lawrence, who retained his presidency on his appointment to be Lord Chief Justice of England, and Lord Hunter for the Scottish Division. Upon the retirement of Lord Trevethin from the Lord Chief Justiceship he was succeeded in the presidency of the Court by Lord Hewart, his successor as Lord Chief Justice. Mr. Hamilton died in September 1922. The work of the Court during its first three years is summarized in its first, second and third reports. It will be convenient to illustrate the principles laid down by the Court by reference to the reasoned judgments given by it and included in the appendixes to its reports, under certain main headings.

De Keyser Decision.—In the first instance, attention will naturally be directed to the application of the legal right possessed by claimants in the result of the De Keyser decision. Three cases seem to bear upon this aspect, the first two, to some extent, by way of limitation. In the cases of *H. W. Brake*[4] and *Robertson and Baxter*[5] claims were made respectively for depreciation in the value of certain plots, through which a light railway was run, and for loss of profits in respect of a distillery

[1] 6 & 7 Geo. V, ch. 63.
[2] 9 & 10 Geo. V, ch. 57.
[3] 8 & 9 Geo. V, ch. 36.
[4] Second Report, Appendix A, No. 9.
[5] Second Report, Appendix A, No. 10.

purchased by the claimants while the Crown was in occupation. In both cases the Court came to the conclusion that the claim upon the basis upon which it was framed had not been substantiated, but, at the same time, whereas in all probability from the Defence of the Realm Losses Commission claimants in such a case would not have received any award, in both cases the Court assessed a sum by way of rent for use and occupation. In the third case, that of the *Barry Urban District Council,*[1] a dispute arose as to whether the recreation ground which had been occupied by the Crown had been occupied as a free gift on the part of the claimant municipality or under some purported letting. Upon the facts of the case the Court came to the conclusion that the Crown had entered into occupation under the purported exercise of the prerogative and again determined a sum by way of a fair rent for use and occupation.

Enforcement of Orders of General or Local Application.—Many vexed questions arose upon the interpretation of the provision in the Schedule to the Indemnity Act as regards the enforcement of orders or regulations of general or local application.[2] The first two cases upon which reasoned judgments were given by the Court related to interferences of this character. These related to orders respectively prohibiting dealings in "King Edward" potatoes in 1918, and taking possession in 1917 by the Government of all raw hides in stock in the United Kingdom. In both these cases the Court held that the depreciation which was alleged to have been caused by the interference of the Government under these orders was not a matter in respect of which it could award compensation. A somewhat similar case [3] arose owing to the taking possession of certain peas and beans under the Beans, Peas and Pulse (Requisition) Order, 1917. In this case similarly the Court held that the loss of profit alleged to have been suffered by the claimants upon the resale of these vegetables was not a matter for compensation by it. An interesting variety of this type of case is presented by a claim in respect of the refusal of a licence under Regulation 8 E of the Defence of the Realm Regulations, which restricted the carrying on of building and construction work.[4] The Court here held that application for and refusal of a licence under a general order such as that regulation cannot convert a general prohibition or restriction on building into a particular case of interference. This line of decision was strengthened by the adverse decision of the Court upon a claim [5] by certain shipowners in respect of loss suffered by them owing to the refusal of the Shipping Controller to permit them to sell certain of their steamers to foreigners. The vessels were sold at a later date by the claimants at prices which were stated to have been considerably lower than the prices which they could have obtained at the time of the Shipping Controller's refusal. A further variant is to be

[1] Second Report, Appendix A, No. 16.
[2] First Report, Appendix A, Nos. 1 and 2.
[3] Second Report, Appendix A, No. 13.
[4] Third Report, Appendix A, No. 4.
[5] Third Report, Appendix A, No. 9.

found in the claims of the *Bowring Steamship Company, Limited*,[1] and *W. H. Cockerline*. In these cases the claimants' vessels were diverted by a wireless order from the Admiralty to an intermediate port, owing to the necessities of the railway strike in 1919. The Court held that, although the operation of the order was limited to vessels laden with specified cargoes within certain areas, the nature of the order was general and not particular. It, therefore, came to a decision adverse to the claimants.

The position of the Court in this respect is made still clearer by two[2] decisions as regards the seizure of explosives in Ireland. In the first of these cases the seizure of explosives was due to an order made by the Government under Regulation 9 AA of the Defence of the Realm Regulations, which was strictly general in its character, and the Court accordingly held that the claimant was not entitled to compensation. About the same time as this order was made, in four other cases, explosives were seized by virtue of an order slightly prior to the order above mentioned and made under Regulation 2 (*e*). The Court held that the contention of the Crown upon the point of a general order in this case was not well founded, since the order complained of was not a public order, but in the nature of a direction to the police simply authorizing certain acts, and judgment[3] was accordingly given for the claimants in each of these cases.

Direct Loss or Damage.—Another point, which is necessarily closely allied with that of the incidence of an order of general application, is that provision of the Act which provides that the loss or damage sustained should be *direct*. Numerous cases of this type have come before the Court. At the outset of its work it was confronted with a claim[4] for compensation owing to the erection by the claimants of an additional furnace under pressure from the Ministry of Munitions. The Court found that there was no satisfactory evidence of any direct interference on the part of the Crown in connexion with the erection of the additional furnace.[5] A case of considerable importance was dealt with by the Court at a later stage, in which claims were made by lessees of houses in Cricklewood over against which a munition factory and latrines annexed thereto were erected by the Ministry of Munitions, while upon the private road in front of the houses motor-lorries of excessive weight were brought with the result that substantial structural damage was done to the houses. The Court found that the damage caused by smoke, smells, noise and unsightliness through the establishment of the factory was not of the type contemplated by the Act, but, having regard to the obligation imposed upon the claimants by their lease to repair the private road, it awarded certain sums in respect

[1] Third Report, Appendix A, No. 16.
[2] Third Report, Appendix A, Nos. 12 and 13.
[3] These judgments are under appeal by the Crown.
[4] First Report, Appendix A, No. 3.
[5] Second Report, Appendix A, No. 14.

of the extraordinary user of that road and the damage thereby caused. Another case of considerable importance was that of the s.s. *Mimosa*.[1] This vessel belonged to a Swedish company, and was refused a clearance in 1917 by the Customs, except on the condition that the claimants should bring over to a United Kingdom port a steamer of equivalent tonnage and agree to the subsequent chartering of the *Mimosa* and of the equivalent steamer for the benefit of the British Government. The Crown contended that the interference took place under the provisions of the Customs Consolidation Act, 1876,[2] but, after consideration of the evidence, the Court arrived at the conclusion that the refusal was, in fact, a purported exercise of a prerogative right of the Crown.

A cognate case to that mentioned above is the claim[3] in respect of the steamer *Prophet*, in which this steamer was released from requisition to the claimants, who purchased her during requisition for the purpose of the transport of pit-props from Canada to the United Kingdom. The steamer was, however, again requisitioned by the Government and the claimants claimed for loss sustained in the sale of cargoes bought for transport by the steamer. The claimants had received hire for the use of the steamer by the Crown, and had made a profit from her sale. The Court decided that the requisition of the ship involved no claim before it, as distinct from the Admiralty Transport Arbitration Board, the claim for hire having already been satisfied. A further claim in respect of loss of business is that of *Sir Alec Black*.[4] In this case certain trawlers were under contract for construction for the claimant by various shipbuilders, and the claimant put in a claim for the excess cost of construction of the trawlers at a later date owing to the postponement of the construction under an individual letter from the Admiralty to the contractors directing them to suspend work upon any vessels being built for private owners. The Court held[5] that this letter was not an order of general application, and that there had been a direct and particular interference with the business (though not the property, owing to the fact that none of the materials involved had become his property) of the claimant. An analogous case is to be found in that of the *Dale Steamship Company*.[6] In this case the claimants had entered into contract in 1915 with certain shipbuilders for the building of a steamer, and had sold the benefit of the contract to the Northern Steamship Company. While the steamer was in the skeleton stage it was requisitioned by the Admiralty, by whose order it was transferred from an ordinary tramp steamer into an oil tanker. An action by the claimants against the Northern Steamship Company for the remaining profit on their contract (£3,744 2*s*. 8*d*.) was dismissed by Mr. Justice Rowlatt, whose decision was affirmed by

[1] Third Report, Appendix A, No. 2.
[2] 39 & 40 Vict., ch. 36.
[3] Third Report, Appendix A, No. 8.
[4] Third Report, Appendix A, No. 18.
[5] This judgment is under appeal by the Crown.
[6] Second Report, Appendix A, No. 4.

the Court of Appeal, which held that both the contracts had come to an end by reason of the interference of the Admiralty. The Court held that, as the Crown admitted there had been an interference with the claimants' business, the sum claimed, the loss of which was admitted, must be regarded as the direct consequence of the Crown's admitted interference. In contrast to these two cases is the claim of the *Anglo-Persian Oil Company, Limited*,[1] where certain material acquired by contractors for the purpose of construction of certain tanks for the claimants had been requisitioned by the Crown. The Court investigated the history of the transaction and came to the conclusion that, upon the evidence placed before it, which is fully set out in its judgment, the property in the plates which had been requisitioned had not passed to the claimants. A curious variant which throws special light upon the meaning of the word "direct" is to be found in the case of the *Trustees of Milton Mount College*.[2] In this case the premises of a girls' school were requisitioned by the Admiralty as a hospital for the treatment of venereal diseases. The claimants, who had, prior to the requisition, moved to other premises owing to the exposure of the original premises to danger from air raids, decided that it would not be proper for them to reopen the school in the original premises, and subsequently obtained other premises elsewhere. The Court determined, upon the medical evidence, which was laid before it, that the claimants acted reasonably, and that their action was the direct consequence of the use to which the premises were put by the Admiralty. It refrained, however, from expressing any opinion as to the particular measure of damages claimed, which subject it reserved for a further hearing.

There remain two very interesting cases in which the line of differentiation is very slender. In one case, that of *Mr. Monypenny*,[3] a mine which had drifted ashore on the coast of Scotland was exploded by order of the Admiralty, damage being done to the adjacent farm-house. The Court originally dismissed the claim, but upon appeal to the First Division of the Court of Session in Scotland,[4] that decision was reversed upon the ground that the explosion of the mine by Admiralty direction was a direct and particular interference, and the Court subsequently determined the sum payable under the decision of the Court of Session as regards the owner, holding that the tenant's claim was not admissible.

The other case is that of the *Misses Stevens*.[5] This claim was for structural damage to certain flats in the neighbourhood of London, alleged to have been caused by vibration from an anti-aircraft gun. The Court was satisfied that the damage resulted from the alleged cause, but held that the claimants had no legal right to compensation apart from the Indemnity Act and that on that assumption the claim must be governed by the principles set out in Part II of the Schedule to the

[1] Third Report, Appendix A, No. 22. [2] Second Report, Appendix A, No. 7.
[3] Third Report, Appendix A, No. 17. [4] [1922] S.C. 706.
[5] Third Report, Appendix A, No. 23.

Indemnity Act. It, therefore, dismissed the claim on the ground that the damage was due simply and solely to the existence of a state of war.

Application of Regulation 2B of the Defence of the Realm Regulations.—Another very important portion of the Court's work dealt with the application of the principles prescribed under Regulation 2 B of the Defence of the Realm Regulations. In the claim by *Pickles and Rae*[1] certain wool and wool-tops were requisitioned by the Crown. The Crown contended that the prices were governed by the maximum prices set out in the Schedule to the Crossbred and Merino Wool (Maximum Prices) Order of May 1917, which set out certain prices for " any crossbred or merino wool in stock in the United Kingdom." The claimants contended that the wool, which was requisitioned in April 1918, was not wool in stock at the date of the Order. The Court held that in this case the maximum prices fixed by the Order applied. This decision was affirmed by the Court of Appeal.[2] There remain two other cases of great importance in this connexion. During the war the Admiralty found it necessary to requisition large stocks of rum for the use of the Navy, and the Admiralty contended that in requisitions of this kind the provisions of Regulation 2B required that the Court should apply the rate of profit usually earned before the war in respect of wholesale transactions of large quantities of rum corresponding in amount to those thus requisitioned. In the case, however, of the *Newcastle Breweries, Limited*,[3] the Court held that it ought to have regard to the rates of profit earned upon sales by the claimants of similar goods before the war, which were half upon a wholesale and half upon a retail basis. No appeal was entered against this decision, but the Admiralty desired, at a later stage, to submit another test case, that of *Gartsides (Brookside) Brewery, Limited*.[4] In this case the Court substantially reaffirmed its previous decision.[5]

Interference with the Person of the Claimant.—An interesting variety, arising directly out of the wording of Part II of the Schedule to the Indemnity Act, is to be found in two cases of interference with the person of the claimant as distinct from his property or business. In the first, that of *W. Hatje*,[6] the applicant, who was a naturalized British subject, was removed by the Competent Naval Authority to an area distant from the sea-coast. In the second claim, that of *S. Maddick*,[7] the claimant was interned upon suspicion of enemy associations. In both these cases the Court held that the interference was not one in respect of which it could award any compensation, and in the Maddick case this ruling was affirmed by the Court of Appeal.

[1] Second Report, Appendix A, No. 17.
[2] Third Report, Appendix A, No. 6.
[3] Second Report, Appendix A, No. 5.
[4] Third Report, Appendix A, No. 21.
[5] This judgment is under appeal by the Crown.
[6] Second Report, Appendix A, No. 6.
[7] Third Report, Appendix A, No. 3.

Decisions upon Questions of Fact.—Cases illustrative of the Court's decision upon questions of fact as distinct from law and the measure of compensation thereby reached are to be found in the somewhat similar cases of the *Moffat Hydropathic Company, Limited*,[1] where the claimants appealed to the First Division of the Court of Session against an award substantially less than that recommended as the correct award by the Government Valuers, and that of *Lady Agnew*,[2] where the Crown appealed against certain amounts awarded by the Court in respect of storage of furniture and in respect of broken vases. In both these cases the Court indicated that its ruling was given upon questions of fact purely, and not upon questions of law, and in both cases its ruling was upheld by the Court of Appeal.[3] The same point is illustrated by the case of *Samuel Williams & Sons, Limited*.[4]

Reopening Previous Decisions or Agreements.—Questions of re-opening previous decisions or agreements under the provisions of s. 2, sub.-s. (3) of the Indemnity Act have naturally assumed considerable importance. Two leading cases are to be found in the claims of *W. Bracey and others*[5] in which case agreements had been made with the Crown without any undertaking that further loss would be considered, and of the *Newfield Sanitary Pipe Company and the Executors of the late J. L. Bucknall*,[6] where the claimants wished to reopen decisions of the Defence of the Realm Losses Commission. In both these cases reliance was placed by the claimants upon the decision in the De Keyser case by the House of Lords as constituting a material change of circumstances under the Indemnity Act. The Court held that the words "proof of a material change of circumstances" implied that the Court should be satisfied by evidence of additional or changed facts in the case itself and decided against the claimants. Another case of great importance was the claim of the *Frederick Hotels, Limited*,[7] which was an application for an increased award in respect of loss of profits owing to the continued occupation of the claimants' hotel after the determination of the Defence of the Realm Losses Commission. The Court held that any excess of profits which might have been proved over the rate awarded by the Defence of the Realm Losses Commission was due to the existence of a state of war and to the consequent closing of many hotels in London. It, therefore, refused the application. A similar application was made by the *Northam Brick Company, Limited*,[8] where it was claimed that profits would have been made owing to the increased demand for bricks consequent upon the Government erection of munition works and buildings

[1] Third Report, Appendix A, No. 10.
[2] Third Report, Appendix A, No. 11.
[3] The Moffat Hydropathic judgment is under appeal to the House of Lords.
[4] Third Report, Appendix A, No. 14.
[5] First Report, Appendix A, No. 5.
[6] First Report, Appendix A, No. 6.
[7] Second Report, Appendix A, No. 8.
[8] Second Report, Appendix A, No. 15.

connected therewith. Here, again, the Court held that such profits would have been abnormal and due simply and solely to the existence of a state of war, and it, therefore, refused the application.

This principle is further stressed by the case of the *Blyth Harbour Commissioners*.[1] This is a claim for loss of "boom" profits upon the import of timber owing to the occupation by the Crown of certain space in the claimants' harbour. Ample space was, in any event, retained by the claimants for their normal business of this kind. The Court came to the conclusion that the claim was one in respect of hypothetical profits, and rested on a highly conjectural foundation, which assumed that the claimants would have had the space in question free in time for the alleged "boom." The Court further held that, even if these profits had materialized, they would have been due solely to the existence of a state of war. A somewhat similar case is that of the *Executor of the late C. E. Brett*,[2] where the claimant had provisionally agreed with the Crown for additional compensation in respect of occupied land to that determined by the Defence of the Realm Losses Commission, on the ground of the increased demand. The Court considered the evidence and, while granting an increased rent, considerably reduced the sum provisionally agreed, upon the ground that the demand in question was due to the scarcity of available land brought about by requisition during the war. In the claim of *J. N. Sharp*,[3] the Defence of the Realm Losses Commission had granted leave for a further hearing, but, owing to various circumstances, that further hearing had been postponed until after the Indemnity Act had been passed. The Court, in this case, regarded the application for reopening as having been originally granted and proceeded to assess a fair rent upon the evidence submitted.

A peculiar case of this character is that of *R. J. Farquharson*.[4] In this case a determination had been made by the Defence of the Realm Losses Commission in the result of a hearing on April 20, 1920. The claimant, however, disputed the determination and took no steps to obtain payment. The claim was subsequently brought before the Court, the claimant contending that it could be put forward as a claim and not as an application under s. 2 (3) of the Indemnity Act, since the determination was made after April 15, 1920, the date specified in that section. The Court held that, in view of the wording of the Indemnity Act, cases determined by the Defence of the Realm Losses Commission after April 15, 1920, were left to the operation of the general law, and that as the claimant had agreed to submit the application to the Commission and to accept its determination as satisfaction for his claim the claim ought to be dismissed.

[1] Third Report, Appendix A, No. 20. This decision is under appeal to the Court of Appeal.

[2] Third Report, Appendix A, No. 7.

[3] Third Report, Appendix A, No. 1.

[4] Third Report, Appendix A, No. 19.

Measure of Loss.—An interesting case, illustrative of the measure of loss, is to be found in that of the *A. and B. Taxis, Limited.*[1] In this case the premises of certain garage proprietors in Dublin were requisitioned by the Government. The claimants, with the view of preserving their business, purchased other premises which they had to equip and adapt. When the Government occupation terminated, the claimants sold the substituted premises for less than the total moneys expended in purchase and equipment thereof. At the original hearing by the Court the expenditure of the claimants on the substituted premises was entirely disallowed. The claimants appealed, and the Court of Appeal allowed the appeal and remitted the case to the Court to assess the compensation payable on the footing that the claim in respect of the substituted premises ought not entirely to be disallowed.[2] The Court found that a certain sum was due to the claimants on this account, and also a sum in respect of interest upon the moneys borrowed by them for the purpose. As, however, the Court had originally allowed a sum corresponding to the latter as a fair rent for use and occupation of the requisitioned premises, it held that the claimants could not be entitled both to a rent for the requisitioned premises and also to interest upon the moneys borrowed for the purchase and equipment of the substituted premises.

Time Limit.—The only case in which the question of the time limit prescribed by s. 2 (1) (ii) of the Indemnity Act has been argued before the Court is that of *Samuel Morris, Limited.*[3] In that case the claim was made on November 24, 1922, in respect of the requisitioning of three steamers in 1915 and 1917 respectively, at which dates the claimant company was not in existence, and the business involved was being carried on by Mr. Samuel Morris personally. The charters of two of the requisitioned ships had expired, and the third ship had been released, and subsequently sunk by the enemy, before the claimant company was formed. The Court decided that even if it could be assumed in favour of the claimants that they were otherwise entitled to claim, the transactions relating to the respective requisitions took place long before August 31, 1921, and that the claim of November 24, 1922, was, therefore, out of time.

Case of the Elliott Steam Tug Co., Ltd.—There remain the two cases which are perhaps the most important dealt with by the Court. The first of these is that of the *Elliott Steam Tug Company, Limited.*[4] In this case the claimants, who carry on business as tug owners, had in 1914 chartered a tug upon terms which entitled them to retain her as long as they pleased with a right to terminate the hiring upon fourteen days' notice. In May 1917 the tug was requisitioned by the Admiralty and retained by them until November 1919. The claimants did not determine the

[1] Second Report, Appendix A, Nos. 18 and 19.
[2] [1922] 2 K.B. 328.
[3] Third Report, Appendix A, No. 15.
[4] First Report, Appendix A, No. 4; Second Report, Appendix A, Nos. 1, 2 and 3.

charter party, being anxious to retain the tug upon the favourable terms of that charter. They, therefore, claimed (*a*) the amount of hire which they continued liable to pay to the owners during the whole time that the tug was under requisition and (*b*) the loss of profit which they would have made during that period by the use of the tug, being prepared to give credit for all sums paid by the Admiralty under their requisition to the owners of the tug. The Court considered that the claimants should have given notice to determine the charter with the view of minimizing their damage, but that they ought to be allowed a reasonable time within which to decide upon that course of action. It allowed, therefore, one month to cover the period of consideration and the period of notice, and gave to the claimants their full claim under both heads for that month. The claimants appealed as regards the question of loss of profits and the Court of Appeal[1] (Bankes and Warrington, L.JJ., Scrutton, L.J., dissenting on the ground that the claimants, as charterers, were not entitled to claim) remitted the case back to the War Compensation Court to find further facts. There was a cross appeal by the Crown complaining of the War Compensation Court's decision that the interference had caused any direct loss to the claimants. This cross appeal was unanimously dismissed by the Court of Appeal. The War Compensation Court reported to the Court of Appeal explaining that its decision, that to award compensation for a longer period than a month would contravene the principle of Part II of the Schedule to the Indemnity Act, was founded upon the impossibility of obtaining a substitute tug, this impossibility being due simply and solely to the existence of a state of war. The matter then came again before the Court of Appeal, who, after considering the report of the War Compensation Court, unanimously dismissed the appeal.

The language used by the Court of Appeal, in this case, has been frequently quoted by claimants and affected the judgment of the majority of the War Compensation Court in the claim of the *Moss Steamship Company*.[2] In that case the claimant company chartered on a time charter a steamer for fifteen months from July 1919, for use in their Mediterranean trade, the charter party providing:

> This Charter Party is subject to first voyage licence being obtained, but if during currency of this Charter Party steamer is directed by the British Government, or in the event of licence being refused for voyage nominated by charterers from time to time for some voyage or voyages this direction is to be for charterers' account, and this Charter Party with all its conditions to remain in force between the charterers and owners, should steamers be requisitioned by British Government this charter to be null and void.

Licences were given by the Government for two voyages, but they refused the licence for the third voyage and directed the owners of the

[1] [1922] 1 K.B. 127.

[2] Second Report, Appendix A, Nos. 11 and 12; Third Report, Appendix A, No. 5.

steamer to send her to Cuba to load a cargo for the Sugar Commission. The majority of the Court (Sir Francis Taylor and Mr. Hamilton) held that it followed from the decisions of the Court of Appeal in the Elliott Steam Tug Company's case that a direction to an owner to send a chartered vessel on a voyage for which she was not hired might be an interference with the charterers and directly cause a loss to them of moneys thrown away and profits. It, therefore, awarded compensation to the claimants in respect of (*a*) loss of hire during the period that the ship was engaged upon the voyage under direction of the Admiralty, and (*b*) loss of profits upon the voyage which she would otherwise have taken to the Mediterranean. A dissentient judgment was given by Sir Plunket Barton, dismissing the claim on the ground that there had been no direct or particular interference with the claimants' property or business, and that no direct loss or damage had, therefore, been suffered by them. This view was based upon an alternative interpretation of the judgment of the Court of Appeal in the case of the Elliott Steam Tug Company. The Crown appealed in this case, and the Court of Appeal[1] reversed the majority judgment of the War Compensation Court, first, on the ground that in this particular case there had been no interference with the business of the charterers, and, secondly, that the case was covered by the provision in Part II of the Schedule to the Indemnity Act relating to the enforcement of orders or regulations of general or local application. An appeal has been entered by the claimants in this case to the House of Lords, which, at the time of writing, has not been heard by that Tribunal.

Summary of Work done by the Commission and the Court.—It may be of interest to sum up the work done so far by the Commission and the Court. The Commission held 888 sittings between April 1, 1915, and August 16, 1920, and determined 5,979 applications. It awarded in all lump sum payments amounting in the aggregate to £3,763,256 against claims for approximately £6,554,809, and periodical payments at the rate of £1,091,827 per annum against claims for approximately £1,728,235. Three hundred and eighty-six applications were withdrawn or otherwise disposed of. The Court during the period between August 16, 1920, and August 16, 1923, has held 629 sittings and determined 2,715 claims. It has awarded in all lump sum payments amounting to £3,423,939 against claims for approximately £6,586,988 and periodical payments at the rate of £54,928 per annum against claims for approximately £83,638. One hundred and forty-six claims have been withdrawn or otherwise disposed of. It has also determined 26 applications under s. 2 sub.-s. (3) of the Indemnity Act.

[1] [1923] 1 K.B. 447.

EUGENICS AND LIMITATIONS OF MARRIAGE.[1]

[*Contributed by* J. P. CHAMBERLAIN, ESQ.]

THE effect of the modern doctrine of eugenics is being felt in State legislative halls. The feeble-minded and other defectives are increasingly the subject of attention, both in their own interest and in that of society. There is a growing tendency to segregate them in colonies for their own well-being and to protect society against possible petty criminals and dependents on public or private charity, and along with this repressive legislation is another trend based on the realization that the misfortune is transmissible, which seeks to protect succeeding generations from an increasing flood of incompetents.

A natural expression of this solicitude for the future is the legislation limiting the rights of certain classes of persons to marry and requiring preliminary evidence of the fitness of the parties to the ceremony. The common law considered marriage as an institution to be highly favoured and therefore looked with a jealous eye on any limitation upon the right of contracting it. Nevertheless, it approved a very ancient principle perhaps, as has been suggested, the result of intuitive eugenics by which marriage between relatives within certain degrees was prohibited.[2] This prohibition was not wholly, however, in the interest of the children. It was extended to certain relatives by marriage and the long fight over the Deceased Wife's Sister's Bill in England is one of the most interesting evidences of the doubts and hesitations of a modern society when confronted with an ancient rule.[3]

From the point of view of the individual and not from that of public policy the common law recognized the invalidity of a marriage where one of the parties was induced to enter into it by the other through a fraud going to the essence of the marital relationship.

In America local conditions introduced into State legislation statutes prohibiting marriage between coloured and white persons, and in western States very generally a like prohibition in respect to Asiatic races. Against attempts to have such legislation declared unconstitutional as contrary to 14th and 15th Amendments and the Federal Civil Rights Act,

[1] Reprinted from *The American Bar Association Journal*, July 1923.

[2] *Gould* v. *Gould*, 78 Conn. 242.

[3] *Brook* v. *Brook*, 9 H.D. Cases 193. Schouler, *Marriage, Divorce, Separation Domestic Relations*, 6th Edition, s. 1090.

this limitation on marriage has been upheld as within the police power of the State ; [1] the federal statute prohibiting polygamy was also declared constitutional.[2]

Recent legislation limiting the right to marry is based not on historic rules or race feeling, but on scientific facts. It is directed against two evils, the bringing into the world of children with hereditary taints and the protection of the public health by preventing the spread of disease through marriage.

The first statutes of this type forbade the marriage of epileptics, imbeciles and feeble-minded. Enforcement was sought through penal provisions imposing prison sentences on violators of the law. Connecticut passed the first such Act in 1895, the minimum prison term being three years. The purpose of preventing childbirth is evident by making the Act apply to women only if under forty-five, and by the application of the penalty to unmarried persons. The Act did not come before the Supreme Court till 1905, when it was attacked as contrary to the section of the State Constitution guaranteeing to the people " life, liberty and the pursuit of happiness." Judge Baldwin, however, in a decision which has ever since been looked upon as authority, upheld the Act, so far as epilepsy was concerned, as a reasonable limitation on the right of the individual to freely contract matrimony. The Court said: " Laws of this kind may be regarded as an expression of the conviction of modern society that disease is largely preventable by proper precautions, and that it is not unjust in certain cases to require the observation of these, even at the cost of narrowing what in former days was regarded as the proper domain of individual right."

The Court, however, would not admit that the prohibition of itself affected a marriage contracted in direct violation of the Act. The statute " fastened upon the defendant an incapacity " which made the marriage fraudulent if it had been dishonestly concealed from the plaintiff, so a divorce could be granted under the statute allowing divorce from " fraudulent contract." That the Court and the Legislature were in agreement on the point of the validity of the marriage is shown by the change in the statute as it appears in the Revised Statutes of 1902, s. 1354. The Revised Statutes do not expressly forbid such marriages, but merely punish those who enter into them. The minimum punishment is also made the maximum, and no minimum established (Revised Statutes, 1918, s. 6428).

In re Jansa's Estate, 171 N.W., 947, the Supreme Court of Wisconsin, citing the Gould case approvingly, held a marriage valid against third parties, though one of the parties was epileptic and the law of the State set forth that " no man or woman either of whom is insane, mentally imbecile, feeble-minded or epileptic shall intermarry." Violation of this section was punished by fine or imprisonment. The Minnesota Court,

[1] See note to *Gould* v. *Gould*, 2 L.R.A., N.S., p. 531.
[2] *Reynolds* v. *United States*, 98 U.S. 145.

applying s. 7990 of the general statutes, which provided that " no marriage shall be contracted . . . between persons either of whom is epileptic, imbecile, feeble-minded or insane," held that a marriage could not be annulled at the suit of the husband where the wife had been epileptic at the time of marriage, if she had not concealed her ailments from the plaintiff, and he had lived with her for some years before discovering the nature of the malady. There was no such fraud in this case as would justify the Court in avoiding the marriage.[1]

A very recent statutory declaration of this principle is contained in Delaware, 1921, ch. 182. That statute goes far in its limitation on marriage. It makes it unlawful " for an epileptic or a person of any degree of unsoundness of mind, or a person who is venereally diseased, or a person who is suffering from any other communicable disease the nature of which is unknown to the other party to the proposed marriage, to marry." The Act provides further that such marriages are voidable at the instance of the innocent party, and a penalty of a $100 fine, or, on default of its payment, imprisonment of thirty days, is inflicted. The difference between the penalty and that established in Connecticut in 1895 shows strikingly a decreasing confidence in the power of the criminal law to prevent socially undesirable marriages.

A few Legislatures have recently taken a different line. The public interest in the prevention of the birth of unfit children is preferred over the public and private interest in the maintenance of marriage. Missouri in 1921, amending s. 7299 of its Revised Statutes, prohibits and declares " absolutely void " marriage between persons either of whom is insane, mentally imbecile, feeble-minded or epileptic. Montana, by ch. 6 of the Laws of 1919, makes marriage " between persons either of whom is feeble-minded . . incestuous and void from the beginning." This Act classes feeble-minded with relatives in the prohibited degrees. Maine, by ch. 40 of the Laws of 1917, makes feeble-minded persons incapable of contracting marriage. In the same year Wisconsin applied the same rule to epileptics, ch. 218, insane persons being already under the disability.[2]

The well-known Wisconsin eugenics law of 1913 may be considered the means of enforcing another common law principle that it was a fraud for one party to conceal the fact of being infected by a venereal disease. This fraud also made the marriage voidable.[3]

Again, in addition to protecting the other individual, the public interest was clearly in view by putting a brake on the possibility of contracting a marriage by a diseased person. In Wisconsin common law marriage does not exist, and a licence is necessary prior to the celebration (s. 2339 n-1.). The Legislature, therefore, required males making application for a licence to present to the county clerk a certificate showing freedom

[1] *Behsman* v. *Behsman*, 174 N.W. 611.
[2] *Kitzman* v. *Kitzman*, 166 N.W. 789.
[3] *Svenson* v. *Svenson*, 178 N.Y. 54, Schouler, s. 1145.

from such disease (s. 2339 n.). In *Peterson* v. *Widule*,[1] this act was held constitutional as a reasonable limitation of the right to marry and furthermore as not unsound classification in applying only to men and not to women. Subsequently Wisconsin added to its law a new section (2330 n.) which applied to both sexes and went beyond what was necessary to meet the common law requirement. No person who has ever had a venereal disease can get a licence until the county clerk is given a certificate from a physician. A similar rule is in effect in many other States, especially in New York (s. 15, Domestic Relations Law, added in 1921). By the New York Act an affidavit must be made by each party, and if either has had venereal disease during the five preceding years a physician's certificate is required. False statements in an affidavit are punished as perjury. The Acts, however, have not extra-territorial effect, so that persons marrying outside of the State would not be liable to the criminal penalty imposed by the statute, and they would not apply in the common law marriage.

Evidently considering other measures insufficient to accomplish the result desired from the public point of view, the prevention of the spread of disease and the limitation of children with bad heredity, the Legislature of Oregon, by ch. 184 of the Session Laws of 1921, made it unlawful for the clerk to issue a marriage licence to any persons until after they had been examined by a physician as to their health, " in regard to contagious or communicable venereal disease and mentality," and passed as shown by a physician's certificate. If they fail to pass " the health and mental test, then they shall not be permitted to marry unless one or both are rendered sterile." It is not stated, but it is to be assumed that the defective or diseased person is meant. An appeal is allowed to the County Court which may order a re-examination by three physicians whose statement " shall be final." This Act was beaten on referendum and would probably have been held unconstitutional if on no other ground than that the affected persons had a right to have the situation as respected their mentality passed on by the Court, but the judgment of a physician was made final. The test, mentality, is so vague that the Act might well be held unenforceable for uncertainty or as involving a delegation of legislative power. The same objection, uncertainty, may be made to the Delaware statute forbidding and making voidable a marriage if one of the parties was " of any degree of unsoundness of mind." By going out of the State it would have been easy to defeat the Act, as the ceremony only was prohibited. This statute is a culmination of a class of Acts passed by many States since 1907. Indiana provided for the sterilization of certain criminals and of feeble-minded and otherwise defective inmates of state institutions.[2] So far as this Act is not a punishment for crime, but applies to inmates of state institutions, it has been held unconstitutional

[1] 157 Wisc. 611.

[2] Statutes cited in *Eugenical Sterilization in the United States*, Harry H. Laughlin, Sc.D.; *Social Hygiene*, vol. vi, No. 4, October 1920, pp. 499–532.

as unreasonable classification.[1] The reason was that persons of this class confined in State institutions would be far less apt to have children than the great number of persons no more fit than they who, because of the prosperity of their parents, could be at liberty. The classification, therefore, was not calculated to obtain the result aimed at by the Legislature, and was contrary to the 14th Amendment. As applying to criminals the operation has been held not a "cruel" punishment and therefore constitutional in *State* v. *Feilen*, 126 Pac., 75 (Wash.), but unconstitutional as "cruel and unusual" in *Mickle* v. *Henrich*, 262 Fed., 687 (Nev.); *Davis* v. *Berry*, 216 Fed., 413 (Iowa). In the latter case the State statute was also held contrary to the inhibition against bills of attainder by the State contained in Article 1, s. 10, sub.-d. 1 of the Federal Constitution where the Act was made compulsory in the case of persons convicted twice of felony.

A serious impediment in the enforcement of those statutes is the lack of an exact standard of deficiency. When the people are convinced not only that mental inferiority is heritable, but that it can be detected with certainty in its victims, the past record makes it appear probable that the law will not lag behind medical science in the protection of future generations.

[1] *Haynes* v. *Lapeer Circuit Judge*, 166 N.W. 938 (Mich.); *Smith* v. *The Board*, 85 N.J.L. 46; *Osborn* v. *Thompson*, 103 Misc. 23 (N.Y.).

THE HAGUE RULES, 1921.

[*Contributed by* C. R. Dunlop, Esq., K.C.]

In a previous article[1] I dealt with the code of rules relating to contracts of carriage of goods by sea which were recommended for international adoption by the International Law Association at its meeting at The Hague in the autumn of 1921. The rules were a compromise and were arrived at by general agreement amongst representatives of business men, who were desirous of satisfying the general demand for a uniform type of bill of lading containing fair and reasonable terms. As was expected, The Hague Rules did not satisfy everybody, and they afterwards received a considerable amount of attention and useful criticism, which led to a few amendments being made in the rules. The Hague Rules as modified by the proposed amendments were discussed at the London Conference of the International Maritime Committee held in October 1922. The Conference was attended by delegates appointed by national associations or committees in the Argentine Republic, Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, Japan, the Netherlands, Norway, Sweden, and the United States, and several Governments were also represented. The Conference agreed in substance with the principles embodied in The Hague Rules as modified, and considered that they afforded a practical and fair solution of the problem as to the risks of loss or damage to goods carried or received for carriage by sea which ought to be borne by the carrier. The Conference also expressed the opinion that an International Convention was the most desirable means of reaching a general solution of the problem, and of the serious conflicts of law which it raises, and that a draft of such Convention should be prepared on the lines of The Hague Rules as modified. In accordance with those resolutions a draft was prepared, entitled "Draft of International Convention for the unification of certain rules for the carriage of goods by sea." The text of the draft was laid before the Diplomatic Conference which met at Brussels a few days after the Conference of the Maritime Committee in London. It was recognized at the Diplomatic Conference that the commercial and practical character of the compromise arrived at by shipowners, merchants, underwriters, and bankers, ought to be respected; but, owing to the very short interval of time between the London and the Brussels meetings, the delegates of the various Governments at the Diplomatic

[1] See *Journ. Comp. Leg.*, Third Series, vol. iv, pt. i, p. 24.

Conference at Brussels had not received any special instructions from their Governments, and therefore it would be necessary to submit the proposed draft to the various Governments concerned for their consideration. It had been hoped in some quarters that the need or demand for reform and uniformity in bills of lading might be attained by the voluntary adoption by business men of The Hague Rules without any legislation, except such amendments in the Harter Act of the United States of America and the statutes of British Dominions based on the Harter Act as might be necessary to enable the Rules to be adopted and applied in these countries, or that uniform legislation in all the Maritime States might be postponed till the adoption of the Rules by agreement had been attempted, and experience of them had been gained. But such hopes appear to have vanished, and The Hague Rules have now entered definitely on the critical stage of adoption or rejection by the Legislatures of the Maritime States.

In the meantime it may be of some interest to refer to some of the differences between the Rules as settled at The Hague in 1921 and those in the Text of the proposed Convention. Some of them consist merely of verbal alterations. Some of the amendments made are substantial, and most of them are in favour of the owner of the goods. The exemption is removed of timber cargoes and goods carried in bulk from the rule which makes the bill of lading *prima facie* evidence of the receipt by the carrier of the number of pieces, quality, or weight, as the case may be, and the apparent order and condition of the goods shipped. The limitation of time for bringing an action against the carrier or the ship in respect of loss or damage is extended from one to two years after the date when the goods were or ought to have been delivered. The excepted perils clause in favour of the carrier is made mutual so as to apply also for the benefit of the shipper. The responsibility of a shipper of goods of a dangerous nature is lessened. Under the original rule the shipper was liable unless the nature and character of the goods were declared in writing by the shipper to the carrier before shipment, and the carrier or his agent consented to their shipment. Under the rule as modified the shipper is not liable if the nature and character of the goods were known to the carrier before shipment, and the carrier or his agent consented to the shipment. The most important modification, however, which has been made in The Hague Rules, is in the rule relating to contracting out of the rules. The original rule gave carriers and shippers liberty to contract out of the rules in regard to any particular goods, subject only to the proviso that in the case of such special agreement no bill of lading was to be issued, and the terms of the agreement were to be embodied in a receipt which should be a non-negotiable document and be marked as such. In the modified rule the liberty to make such special agreement is not to apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property

to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. Business men are generally more likely to know best in what circumstances a special agreement may be to their mutual benefit. The question whether any particular circumstances are such as to justify a special agreement is not left by the new rule to the parties to decide finally for themselves; but after they have entered into such an agreement it will be open to the owner of the goods to appeal to a Court of law to decide that question, and if the Court were of opinion that the shipment was an ordinary commercial shipment made in the ordinary course of trade, or that the circumstances were not such as reasonably to justify a special agreement, it would evidently have no alternative except to decline to enforce or give effect to the special agreement, or to substitute for it an agreement in accordance with the Rules on the ground that the parties, although they did not make such agreement, ought to have done so. The validity of special agreements will therefore be attended with some uncertainty. The question whether any particular circumstances are such as reasonably to justify a special agreement may be difficult to decide, and it is a possible view that a Court of law may not be so qualified to decide the question as the parties who have entered into the agreement. One of the main objects of The Hague Rules was to secure that every bill of lading which might be put in circulation should be a reasonable and reliable document, and the contracts to which the Rules are expressly made applicable are those contained in bills of lading. If a special agreement is made to which the Rules are not to apply, there is a special provision that no bill of lading is to be issued, and that the terms agreed are to be embodied in a receipt which is to be a non-negotiable document and be marked as such. The object of this provision was that anybody dealing with a bill of lading would know that it was governed by The Hague Rules. The restriction against the insertion of unreasonable clauses in favour of the shipowner in bills of lading has much more to be said in its favour than the limitation imposed by the rule as amended on the freedom of contract in contracts of carriage which are not contained in a bill of lading or other negotiable document.

The text of the proposed Convention also contains provisions as to the application of the Convention so as to avoid difficulties which might arise in cases where there may be a conflict of laws. It has also a wise provision that any of the States, which may sign or declare their adhesion to the Convention, may get a new Conference held three years after the Convention may come into force for the purpose of examining any improvements in the Rules which experience may suggest.

The fate of The Hague Rules depends on the reception of the text of the Convention by the Governments of the Maritime States of the world. There may be difficulties or delays in reaching international agreement, but the desire for such agreement is widespread and insistent.

THE MAIN POINTS OF THE DUTCH CRIMINAL AND CIVIL CODES PERTAINING TO MINORS.

[*Contributed by* Dr. N. van Hasselt.]

The law relating to minors is to be found nearly exclusively—as regards the Civil Law—in the 15th and 16th Titles of the Civil Code which came into force on October 1, 1838. Drastic modifications were made by the Act of February 6, 1901, State Paper No. 62, the so-called Civil Children's Act, being thus named in contrast to the Penal Children's Act of February 12, 1901, State Paper No. 63. The latter contains special provisions deviating from the ordinary Penal Law, and it introduced far-reaching amendments to the Penal Code of 1881. Further modifications were thereupon inserted by an Act of September 27, 1909, State Paper No. 322, in the titles of the Civil Code in order to eliminate objections which arose in their application.

Finally must be mentioned in this connexion an Act of July 5, 1921, State Paper No. 834, which provides for the establishment of Juveniles Judges and for the supervision of minors. This Act also modified the provisions of the Criminal and Civil Codes on the subject and it came into force on November 1, 1922.

Criminal Code.—Before 1901 no punishment whatsoever could be inflicted on children of less than 10 years of age. If the deed was committed by an older child, and if it came within the provisions of definitely indicated offences, it was possible to order confinement in a State Establishment. Apart from the above, the usual punishments, such as imprisonment, detention and fines, were applicable to children. Punishment could only be inflicted on a child between the ages of 10 and 16, however, if it could discriminate between right and wrong at the time of the offence.

The following are the most characteristic principles of the Penal Children's Act of 1901:

The age limit of 10 years, under which a child might not be prosecuted, is deleted.

The limit of minority in respect to penal law has been increased from 16 to 18 years of age.

The criterion of discrimination between right and wrong is also deleted.

The judge may order that a child of less than 16 years of age is to

be sent back to its parents or guardian without any punishment having been inflicted. (Article 38.)

The judge may order that a child shall be detained and educated by the State, without the infliction of any further punishment, to a limit of 21 years of age, provided the child had not reached the age of 18 years at the date of the sentence (Articles 39 and 39bis). It is possible to order education by the State without the sentence being actually carried out, provided no further punishable offence is proved during the period mentioned in the sentence (Article 39bis*a*). In the case of a serious crime, punishment may be imposed to not more than half the maximum punishment fixed for such crimes and, in the case of life sentence, to not more than 10 years. Such imprisonment is not carried into execution until the cessation of the aforementioned State education (Article 36ter). The execution thereof may then be suspended by the Minister of Justice, and it is cancelled altogether at the end of the period of imprisonment defined in the sentence. It is cancelled in any case as soon as the person has reached the age of 25 years.

The system of actual punishments has been completely changed. With a few exceptions, no imprisonment or detention can be inflicted on persons of less than 18 years of age; instead there may be ordered: (*a*) confinement in a reformatory, (*b*) fine, (*c*) admonishment (Article 39septies).

It is possible to order confinement in a reformatory without the sentence actually being carried out, provided no further punishable offence is proved during the period mentioned in the sentence (Article 29octies).

In the case of criminal proceedings against a minor in respect to a crime or one of the specially indicated offences, the judge may pass sentence ordering supervision for a defined period on account of the reasons contained in Article 373 of the Civil Code (for Article 373, see page 268). This Article was inserted in the Criminal Code by the aforesaid Act of July 5, 1921.

The latter Act provides for one judge to sit in every District (Arrondissement) Tribunal and this judge deals with civil juvenile cases and is, at the same time, charged with the criminal jurisdiction for juveniles.

Civil Code.—The important alterations brought into the Civil Code in 1901 owe their origin in substance to two considerations. Firstly, that more equality had to be established between women and men, and, secondly, that the State ought to occupy itself more extensively, and more effectively, not only with the punishment, but also with the all-round protection of neglected and criminal children.

It was realized that deprivation of parental authority solely in cases where parents had committed serious offences against their children, was inadequate, and that appropriate changes were essential in this connexion.

Up to that time (1901) paternal authority had been regarded as an inviolable right, and only the penal judge was able to deprive parents of their authority. Such deprivation was additional punishment, inflicted for no longer a period than 2 to 5 years over and above the main punishment (imprisonment, etc.).

With the new system of deprivation and release from parental authority and guardianship by order of a civil judge, the duty of parents in regard to their children has come more to the foreground. The superscription of the 15th Title expresses clearly the greater equality between women and men, for it now reads " Of the parental authority," instead of " parental authority."

The provisions regarding guardianship are to be found in the 16th Title.

Parental Authority.—Article 354 reads as follows:

" During the parents' marriage the child shall remain until its majority under their authority in so far as they are not released from or deprived of such authority."

Three new prescriptions are laid down in this article:

(1) both parents exercise authority;

(2) parental authority only exists during the marriage; and

(3) it exists only as long as the parents observe properly their duties towards their children.

Equality between the mother and the father is, however, for the greater part more apparent than real. It is the latter who decides about education and support; he can not only fix a profession for the child in spite of the mother's wishes, but also take the child away from her.

All this proceeds from the provision of Article 355, 1st paragraph:

" Except in the case of release or deprivation, and without prejudice to the provisions concerning separation from bed and board, the father alone shall exercise this authority."

The original Bill gave more prominence to the equality between the father and mother; it enumerated certain subjects on which the parents had to agree, *i.e.* the choice of a profession and the place of education. The cantonal judge was to decide in cases where the parents had not come to an agreement on these subjects. Much opposition arose in Parliament against this provision, chiefly because it was thought a greater evil to leave the decision to a third person than to give a privileged position to the father.

If the father is unable to exercise parental authority, such authority is exercised by the mother, except in the case of judicial separation (Article 355, para. 2). In this case the father loses his authority altogether, and it passes to the mother as her own right.

If the mother is also unable or not entitled to exercise this authority, a guardian is appointed by the cantonal judge.

The father or mother exercising parental authority or guardianship

has the usufruct of the children's goods. In the event of both parents having been released from parental authority or guardianship, the parents share the usufruct of their minor children's property (Article 366).

Before 1901, the father had the usufruct and on his death it passed to the mother. The usufruct of both parents in the event of their having been released from parental authority has been fixed lest the parents suffer any financial prejudice on the ground of their being unsuited or unable to fulfil their duty. In the case of the father having been deprived or released, the mother has the usufruct; in the case of the mother having been deprived or released, the father has the usufruct.

What are the cases in which deprivation and release may be pronounced?

If the judge considers it necessary in the interests of the children, each of the parents, in so far as parental authority has not been lost, may at the request of the other parent or of a relation by consanguinity or affinity of the children to the fourth degree inclusive, be deprived of parental authority over one or more or all the children on the ground of (*a*) abuse of parental authority, (*b*) living a bad life, (*c*) intentional non-co-operation with the family guardian (Article 374 (*a*), para. 2).

Deprivation may be pronounced in regard to both parents. In the case of deprivation of the parent not holding authority, the measure is merely preventive and is taken in order that that person shall never exercise authority. If only one of the parents has been deprived parental authority continues, for the other parent then exercises it by law, provided he has not been deprived or released.

At the request of the Board of Guardians, or at the demand of the Public Prosecutor, the person exercising parental authority may be released from that authority either in respect of all the children or in respect of one or more of them, on the ground of his being unsuited or unable to fulfil his duty in attending to them and bringing them up, provided the interests of the children are not opposed to such release on some other account (Article 374 (*a*), para. 1).

Release may be pronounced in the case of the parent being unsuited or unable to educate the children. He may then be granted dispensation, while for unwillingness or unworthiness deprivation has to be inflicted. Moreover, release can never be pronounced if the person exercising parental authority raises objections to such a measure (Article 374 (*b*), para. 3).

The person released or deprived of parental authority may, at his own request as well as at the request of the persons who have the right to request his release or deprivation pursuant to Article 374 (*a*), as well as at the demand of the Public Prosecutor, be re-established in his parental authority or appointed guardian over his minor children, if it transpires that the facts which led to the release or deprivation are no longer an obstacle thereto. Likewise, the person released or deprived of the guardianship or supervisory guardianship over his own children

who has subsequently remarried his former spouse, may be re-established in parental authority during this marriage (Article 374 (*e*)).

Guardianship.—According to Dutch law, minors who are not under parental authority shall be placed under guardianship. Since 1901, minors are persons who have not reached the full age of twenty-one years or have not contracted marriage earlier.

Other age limits for young persons in Dutch law are:

20 years for being declared of age (emancipation, *venia ætatis*);
18 years for limited emancipation;
15 years of age for bearing witness in civil law matters;
16 years of age for bearing witness in criminal law matters;
16 years of age for a woman to marry;
18 years of age for a man to marry;
18 years of age for making a last will and testament;
19 years of age for a man to recognize a natural child;
30 years of age for not needing the consent of parents to contract a marriage.

Under the age of 21 years a person may not marry without the consent of his parents. Between 21 and 30 years of age consent must be requested. If it is not given, the intervention of the cantonal judge is necessary. This is merely a formality, for the judge may never refuse permission.

Guardianship has always been considered a task which should be entrusted to the members of the family to which the minor belongs. Besides, intervention by authority of the State in matters of guardianship occurs in the legislation of most countries, especially in Germany, in contrast to the French Civil Code whereby the *conseil de famille* exerts great influence. The Dutch system follows a middle course between these two extremes.

It is not a *conseil de famille* who appoints the guardian, but either the judge or one of the parents. In addition, guardianship by law is possible. The intervention of the State in matters of guardianship is exercised by Boards of Guardians which are also established by virtue of the Act of 1901. The number of the Boards is 27. On the one hand, they give guidance to private initiative, and, on the other hand, they are reliable and independent advisers for the judges, *e.g.* about the desirability or necessity of deprivation of, release from or re-establishment in parental authority and guardianship. Private persons can come to these Boards and ask for assistance in bringing cases before the judge. These Boards exercise no guardianship, but in a few cases they take charge provisionally. They have each 5 to 11 members, appointed by the State for a period of 6 years. They have no salary, but compensation is allowed for travelling expenses. Each Board has a salaried secretary. The work of the Boards also includes the inspection of private institutions charged with guardianship according to Article 421. Finally may be mentioned their task of collecting the money paid

by parents who are deprived of or released from their authority, for the education of their minor children.

There is never more than one guardian and one supervising guardian over each child. Women may also be appointed as guardians. With a few exceptions, everyone must accept guardianship. In the case of refusal, the cantonal judge appoints an administrator instead of and at the expense of the person who refuses. Neither a guardian appointed by one of the parents nor a married woman who has been appointed guardian is bound to undertake the guardianship (Article 387 (*a*)). A married woman cannot undertake guardianship without her husband's consent (Article 387 (*b*)).

After the death of one of the parents, guardianship of the minor legitimate children belongs by law to the surviving parent in so far as the latter has not been released or deprived of parental authority (Article 400).

In this case, therefore, complete equality exists between women and men.

An illegitimate child stands by law under the guardianship of the major father or major mother who has acknowledged the child. If both parents have acknowledged the child, guardianship is exercised by the parent who first acknowledged it; and if the acknowledgment is made simultaneously by both, guardianship is exercised by the father (Article 408).

The appointment of a guardian is not valid if the parent making the appointment did not at the time of his death possess guardianship over his children or exercise parental authority (Article 410).

After the guardianship of (1) the surviving parent and (2) the appointment of a guardian made by last will or by a notarial deed drawn up for that purpose exclusively, comes (3) the guardian appointed by the judge according to Article 413, para. 1, which reads as follows:

"Over all minors who are not under parental authority and whose guardianship has not been provided for already in a legal manner, a guardian shall be appointed by the cantonal judge unless the appointment has been entrusted to the district tribunal."

In all cases in which the cantonal judge or the tribunal has to appoint a guardian, guardianship may be entrusted either to a private person or to a corporate society or to a foundation or benevolent institution established in the kingdom if the articles of association, letters of foundation, or regulations provide for the permanent care of minors (Article 421).

A supervising guardian is appointed in every case of guardianship (Article 422).

The supervising guardian's duties consist of the observance of the minor's interests whenever they are contrary to those of the guardian (Article 427). He is also bound to see that the guardian fulfils his obligations. Finally, if the guardianship has become vacant or been forsaken by the guardian, or if the guardian is temporarily unable to

exercise guardianship, the supervising guardian is bound on penalty of compensation of cost, loss and interest, to bring about the appointment either of a new guardian or a temporary guardian, and is bound to perform in the meantime all acts of guardianship which cannot be postponed (Article 431).

He has to express an opinion in many cases wherein the guardian needs the judge's consent before taking action.

Deprivation and release as well as re-establishment in guardianship and supervisory guardianship may be pronounced.

The tribunal is at liberty to suspend the exercise of guardianship or supervisory guardianship during the inquiry either wholly or in part and to grant to a person designated by it or by the Board of Guardians such powers in respect of the minor's person or goods as it may deem proper (Article 439).

The Public Prosecuting Attorney has power to entrust minors provisionally to the care of the Board of Guardians on the ground of facts which may cause dispensation, as well as on the ground that the minors are neither under parental authority nor under guardianship (Article 439 (*a*)).

Since 1901, more equality between women and men has also been brought about in the law governing guardianship. Articles 401, 404 and 405 have been repealed. According to Article 401 the father could appoint a special councillor to assist the surviving mother. Article 404 said that the mother was not bound to undertake guardianship. Finally, Article 405 contained a provision that a mother-guardian wishing to remarry was obliged to apply to the cantonal judge in order to be confirmed in the guardianship. In the case of her not doing so, she lost the guardianship.

Difference between guardianship of the father and the mother now exists only in a few cases:

(*a*) If, after the death of the husband, the wife declares, or, having been legally summoned to appear, acknowledges that she is pregnant, the cantonal judge appoints a curator over the unborn child in the manner provided for in respect to the appointment of guardians.

This curator is bound to employ all necessary and urgent measures required for the preservation and administration of the goods, and to do so for the benefit of the child if it is born alive, as well as for the benefit of all other persons concerned.

If the child is born alive, the curator becomes by law the child's supervising guardian, unless such a supervising guardian already existed for the other children (Article 403).

(*a*) If the mother-guardian contracts a marriage and her husband has not been excluded from or deprived of guardianship, he is by law a co-guardian during the marriage and as long as no separation from bed and board or goods exists between the spouses, and he is responsible, side by side with his wife, individually for the whole on

account of all acts performed after the marriage has been contracted (Article 406).

The situation is, therefore, that a remarried woman may be a guardian of children of another person without a co-guardianship of her husband, but the second husband is co-guardian to her own children.

The main obligations of a guardian are to care for the education of the minor, and to manage its goods as a good family man (*bonus pater familias*). To that end, he must immediately, and in the presence of the supervising guardian, proceed to make an inventory of goods or cause it to be made (Article 444). Moreover, the guardians are bound to make, as a security for their administration, a mortgage conveyance to the amount of a sum proportionate to the administration of the guardianship (Article 390). Finally, they are bound to cause a supervising guardian to be appointed immediately after the commencement of the guardianship (Article 423). Every two years, the supervising guardian must demand a summarized account from the guardian and must cause the securities and documents pertaining to the minor to be shown to him (Article 429). The father and mother are exempted from these obligations.

The Family Guardian (Act of July 5, 1921).—The above-mentioned system is undoubtedly one of extremes. The judge must either refrain from any measure at all, or he must intervene very strongly. Great need of a middle course between the two extremes became perceptible, and this Act of 1921 brings radical improvements so that the judge is able to intervene sooner and to arrest the evil at the beginning, there being, consequently, less occasion for deprivation and release.

The new institution is that of family guardian (probation officer). Article 373 reads as follows:

"If, from whatsoever cause, a child is growing up in such a way as to be menaced with moral or physical ruin, the juveniles judge may place that child under supervision for a specified period either at the request of the person exercising parental authority or one of its relations by consanguinity or affinity to the fourth degree inclusive, or of the Board of Guardians or at the demand of the Public Prosecutor."

The juveniles judge designates a male or female person who, under the name of family guardian, is entrusted with the supervision of the child, and has to observe the directions of the juveniles judge (Article 373 (*e*)).

Such placing under supervision may not be ordered for a longer period than one year, and terminates in any case when the child reaches its majority (Article 373 (*i*)).

The family guardian is bound to seek personal contact as far as possible, both with the child and the family to which it belongs, and he must communicate to the juveniles judge at least once a month his experiences in regard to everything concerning the child and its surroundings (Article 373 (*k*) and (*l*)).

Supervision as introduced by this Act may take place only during parental authority, *i.e.* it does not exist when the child is under guardianship.

It should be emphasized that the parents remain the educators ; the new system has been established mainly in order to maintain parental authority in cases where the judge would have pronounced deprivation or release under the former legislation. The name of " family-guardian " has been chosen in order to indicate that that person must observe, for the sake of the children, also the family to which it belongs. The juveniles judge may order that the child under family guardianship shall be admitted for a specified time to an establishment, designated by General Administrative Measure, intended or suitable for children requiring special discipline.

If a child has been placed under supervision, the person exercising parental authority shall be obliged to bring up that child in conformity with the directions of the family-guardian, without prejudice to appeal to the juveniles judge (Article 356).

The functions of the juveniles judge has also been introduced into Dutch legislation by this Act of 1921. We have already mentioned his task in connexion with criminal proceedings.

The basic conceptions which distinguish juveniles judges from other judges are the following : Children are to be dealt with separately from other persons. Their cases are to be heard at a different time and in a different place ; they are to be detained in separate buildings. The juveniles judge must keep in constant touch with the children who have appeared before him. Taking children from their parents is, when possible, to be avoided ; on the other hand, parental obligations are to be enforced. The procedure of the Court must be as informal as possible. Its purpose is not to punish but to save. It is to deal with children not as criminals but as persons in whose guidance and welfare the State is peculiarly interested.

NOTES ON EGYPTIAN LAW.

[*Contributed by* Sir Malcolm McIlwraith, K.C.M.G., K.C.]

Assize Courts in Egypt.—A comparatively recent number of the Egyptian Review, *L'Egypte Contemporaine*, contained an article on Assize Courts in Egypt, by Monsieur Joseph Soudan—being a lecture, given before the Egyptian "Society of Political Economy, Statistics, and Legislation." As Monsieur Soudan (a Belgian jurist) is one of the most distinguished judges of the Egyptian Native Court of Appeal, and has sat in Assize Courts for many years past, any criticisms or observations which, as the result of his experience, he has to offer on their working or organization, are clearly entitled to attention and careful examination.

Assize Courts were first instituted in Egypt in 1905, in order to remedy certain grave defects of the then existing criminal procedure. Under that system, prisoners, accused of the graver classes of crime—i.e. those punishable with death, penal servitude, or rigorous imprisonment (détention)—were tried, in first instance, by the seven Central Tribunals, which sat in various parts of the country, throughout Lower and Upper Egypt. These Tribunals alone heard the witnesses (in practice), and from their decisions there was an appeal to the Court of Appeal in Cairo.

The main, and very grave, defects of that system were (*a*) the dangerous and unsatisfactory character of a procedure under which crimes were tried, on appeal, without hearing the witnesses, with frequent reversals of the findings, on questions of fact, of the Tribunals of First Instance who had had that advantage; and (*b*) the inordinate delays, amounting on an average to some eight months, which elapsed between the commission of the offence and the final judgment of the offender.

The reform, introduced in 1905, consisted in the establishment of Assize Courts, composed of three judges of the Native Court of Appeal, who held monthly assizes in the provinces and disposed of all crimes in the localities where they had been committed, without appeal, save on points of law to the Court of Cassation in Cairo. This measure was bitterly opposed, on various sides and for quite different reasons, for several years; but it was eventually carried through, mainly by the powerful aid which it received from the late Lord Cromer, whose efforts to diminish crime, by more effectually repressing it, were energetic and unceasing.

The new system proved a great success from the outset. Practically all the judges who had had experience of both systems declared emphatic-

ally that, sitting in an Assize Court and themselves hearing the witnesses, they arrived at their decisions with a definitely higher degree of certainty than was the case when they tried, on the papers, appeals from the Central Tribunals. Moreover, as regards increased celerity of trial and consequently greater repressive effect by speedy retribution on wrongdoers, the interval between the commission of a crime and the final sentence on the offender was reduced by the new system from an average of 230 days to 71.

In what, then, do M. Soudan's criticisms of this reform consist? In the first place, it is satisfactory to note that he does not attack the principle of the change made in 1905, nor contest the great superiority of the system then instituted over that which preceded it. He is, indeed, most careful to make this clear. " Il ne s'agit nullement," he says, " de remanier l'institution existante de fond en comble, à la lumière d'un idéal plus élevé, *mais seulement de l'amender un peu, et par les petits côtés* " (p. 1). Again (p. 13), " Le mérite intrinsèque des Cours d'Assises, n'est pas en cause . . . la qualité des décisions rendues n'est guère critiquée. . . . De retourner à l'ancien système il n'est pas question . . . tous les retards constatés, tous les échecs seraient bien vite accentués immensément avec le système plus lent des deux degrés de juridiction."

On the absolute necessity for the final judges of hearing the witnesses, before men are sentenced to death or penal servitude for life or long terms of years, Monsieur Soudan's testimony is as emphatic as any which was given by other judges at the time of this reform. " Il suffit," he says, " d'une expérience judiciaire même restreinte pour savoir la différence capitale qu'il y a entre le témoignage direct, criblé, contrôlé, analysé et pesé, et la seule lecture d'une relation forcément résumée, même objectivement exacte, de la déposition du témoin qu'on ne voit pas. . . . On apprécie un témoin presque autant par les yeux, qui perçoivent l'attitude, le trouble, l'hésitation, et, dans une certaine mesure, la sincérité, que par les oreilles" (p. 6). These considerations were, indeed, the predominant motive of the Ministry of Justice, in urging this reform, throughout the long campaign which it had to undertake, in order to get it adopted. Monsieur Soudan suggests that the fundamental consideration was celerity of procedure, for otherwise it would have sufficed to modify, in this respect, the existing system. This is not the case. (See e.g. *Report of the Judicial Adviser for* 1905, p. 16, where the question of the witnesses is put *first*, and discussed at considerable length, before " passing to the second point, the question of delays and other statistical considerations.") But though the question of delay was always of secondary importance to the Ministry of Justice, it was the one which appealed most strongly to the executive heads of the Government, the Ministry of the Interior, the Police, and the general public—who are little interested in the details of procedure but are greatly concerned with the expedition of trials, and whose powerful support it was essential to enlist. It had, therefore, to be given a very prominent place in the controversy.

I come now to the principal defects of the institution—under its present organization and as now working—on which Monsieur Soudan lays stress. They are, as he indicates, in the words above quoted, at the commencement of his lecture, of comparatively minor importance. They relate (*a*) to the fact that the original shortening of the proceedings has not been fully maintained and that the proportion of prisoners kept in prison for long periods has largely increased, and (*b*) to the circumstance that the burden of work, under the somewhat uncomfortable conditions of travelling in the provinces, imposed on Assize Court judges has become so onerous, by reason of the increase of crime, as to be almost intolerable.

As regards the first of these criticisms, Monsieur Soudan, after quoting certain statistics, concerning imprisonment before trial, concludes: "Je dirai seulement qu'il est devenu absolument exceptionnel de voir juger une affaire où plus de quatre mois, au moins, ne se sont pas écoulés depuis que le fait a été commis." If this is a *minimum*, and not an *average*, figure, it is undoubtedly excessive; but before accepting it as such, one would like to see full official figures on this precise point, for the general impressions of individual judges are sometimes deceptive. As an *average* figure, though a very regrettable decline on the interval of 71 days originally attained, and which was still only 106 days in 1916, it is, nevertheless, only about one-half of the former period of 231 days, and it does not, I believe, compare unfavourably with the criminal statistics of most European countries for Assize Court cases.

In France, as is well known, the "instruction" in murder cases frequently lasts a year or upwards. In the great Landru case, it was very considerably longer. In England, the official criminal statistics are discreetly silent on the point, but it may be doubted whether the average period is materially shorter—at any rate in grave cases. In the celebrated Armstrong poisoning case, of last year, the prisoner was arrested in December, and kept in prison till the Herefordshire Assizes in April; and the circumstance evoked no comment.

As regards the second point, viz. what M. Soudan himself describes as "the constant and phenomenal increase of crime" in Egypt of late years—in reality, the principal factor in the whole situation—has had the result of adding greatly to the labours of Assize Court judges and prolonging the period of absence from their homes while on tour in the provinces. Sympathy will, no doubt, be felt for them, and a remedy will probably have to be found. M. Soudan proposes two. The first is that Assize Court Benches should be composed of two, or, preferably, even of one judge of the Court of Appeal, sitting with one, or two, of the local judges of First Instance. As a matter of fact, it was precisely because it was foreseen, from the outset, that Assize Court work in the provinces would tend to increase—with the almost inevitable accumulation of arrears—and that three Appeal Court judges could not permanently be spared for this duty, that the original scheme of the Ministry of Justice provided for two such

judges only, sitting with the President or the Vice-President of the local Tribunal. But the Legislative Council, at that time, was strongly opposed to the admission to these Benches of First Instance judges—mainly because such judges, unlike Appeal Court judges, are removable by the Government, and are consequently open to the suspicion of subservience to the influence of the Executive. It will be highly interesting and instructive to observe, should this proposal or a similar one be revived, whether, in an " independent " Egypt, this distrust of the Government has wholly disappeared.

Monsieur Soudan's second remedy is " la correctionalisation "—that is to say, the removal from the jurisdiction of Assize Courts to that of inferior tribunals of cases of crime where, on the facts, Assize Courts would be unlikely to inflict a grave sentence. This seems a sound suggestion.

In conclusion, we understand that the whole question is engaging the earnest attention of the Ministry of Justice at the present time. It may be hoped that some inquiry into the causes which have led to the enormous increase in crime, in Egypt, during the last few years, is forming part of its investigations. The statistics of grave crime have risen, since 1916, from 4,302 (at about which figure they had stood for the preceding five years) to 6,779 in 1919 (the last year for which official statistics are available), and are believed to be still rising.

This matter used formerly to be the object of the unceasing vigilance and solicitude of the principal authorities in Egypt. It obviously lies at the root of the whole problem.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Extra-territorial Legislation.—It is not surprising that another attempt should have been made to establish the view that there is no constitutional restriction on the powers of Dominion Legislatures to pass enactments with extra-territorial effect. The failure of the Imperial Government to propose to Parliament any measure to meet the desire of Canada in this regard, coupled with the silence of the Constitution of the Irish Free State on the topic, indicates clearly the reluctance of the legal advisers of the Crown in England to prepare a statutory enactment on the subject, and encourages the suggestion that the Courts may feel themselves at liberty to ignore the alleged restriction. To aid them, Professor Smith [1] assails the interpretation of the famous case of *Macleod* v. *Attorney-General for New South Wales*,[2] which in his view can be reduced to a decision on a badly drafted statute with an obscure *obiter dictum*, whence a false conclusion has been drawn. But this view is really subject to a fatal defect; were it not for the territorial limitation on colonial legislative capacity, the Privy Council would obviously have had no difficulty whatever in holding that the statutory provision in New South Wales meant that any British subject who committed bigamy abroad after a marriage in New South Wales was liable to punishment by a New South Wales Court. The fact that this simple solution was not taken is clear proof that the Court meant what it has normally been taken to have meant, that a colonial Legislature has a power much more limited in respect of ambit than the Imperial Legislature. This view is that of the Court of Appeal of New Zealand,[3] despite all the efforts made to shake the authority of *Macleod's* case before that august tribunal, and it appears that only the Judicial Committee itself can lessen the weight of that decision.

Certainly no weight can be laid on the cases *contra* adduced by Professor Smith. That of *Cain and Gilhula* v. *Attorney-General for Canada*[4] asserts merely that the right of the Dominion to control immigration extends to removing beyond the borders prohibited immigrants, though

[1] *Canadian Bar Review*, 338–50.

[2] [1891] A.C. 455.

[3] See *Journ. Comp. Leg.*, Third Series, vol. ii, pt. iii, pp. 328, 329; vol. iii, pt. i, pp. 132, 133.

[4] [1906] A.C. 542.

this cannot be done without a certain amount of constraint being applied beyond territorial waters, *e.g.* in the vessel on which the immigrant is deported. It does not even assert that Canadian law can be regarded as in force on board the vessel in which the deportee is being carried out of territorial waters; when the case arises in which the legality of such action is discussed,[1] it may be assumed that the Court by which the issue is decided will adopt the view that the master of the ship cannot be held liable either criminally or civilly, because, so far as he was concerned, he exercised no constraint to bring the deportee on board, and could not be expected to do more than permit him to land at his first port of call, if the local authorities there would permit debarkation. Still less is there any stress to be laid on the case of *The Ship "North"* v. *The King*[2]; the crime there was one of fishing within Canadian territorial waters, and the only point, which arose as to action beyond territorial limits, was the capture in hot pursuit of the offending vessel by a Canadian Government ship. Obviously, whatever the merit of the contention in international law, the Court could merely consider the guilt of the ship, not any irregularity of its capture. Similarly nothing can be made out of the Canadian legislation as to the punishment of bigamy, for the simple reason that, the Legislature having realized the limits of its power, the offence is brought within the territorial power by making an element in it the quitting of Canada with a view to committing bigamy. On the other hand, that the limitation is needless and troublesome may freely be admitted, but, unless there are to be interminable conflicts of legislation, it is clear that the matter can only be made effectively satisfactory by conjoint agreement between the Dominions and the Imperial Government, and by legislation based on such an agreement.

The Liberty of the Subject.—The proceedings in *Art O'Brien's* case[3] afford, perhaps, the most satisfactory vindication since the outbreak of war of the rule of law as an essential feature of the British constitution. It is, of course, true that the exercise of arbitrary power over the liberty of the subject was expressly disclaimed as desirable by the Government, which in the House of Lords entirely concurred in the principle laid down by Viscount Grey that "the Executive should not, without the previous and special authority of Parliament, exercise the power of arrest without bringing to trial by due process of law." But the natural tendency of all Governments to strain power is exemplified by the advice which the Law Officers of the Crown admittedly tendered to the Government to the effect that it was possible to deport persons to Ireland for detention in custody fixed by the Irish Free State Government under Regulation 14 B made under the authority of the Restoration of Order in Ireland Act, 1920. That they should have held that the power existed was due to their regarding the legislation from a less broad point of view than the Court which, unconcerned with the practical advantages of being able to

[1] Cf. *Imperial Unity and the Dominions*, p. 131. [2] Can. 37 S.C.R. 385.
[3] 39 *The Times* L.R. 413, 487, 638.

deal in this way with suspects, was able to interpret the statute on the basis that any power to deny the advantage of *habeas corpus* must be expressly and effectively given by statute. In the case of O'Brien the position which the Secretary of State for Home Affairs had to justify was of special difficulty; he had to maintain that he possessed the right to arrest in England, and to deport from England to the Free State, persons who then fell under the legal control of the Free State Government and over whom he had no legal authority whatever, although the Free State Government was under agreement in certain eventualities—not formally including that which actually occurred—to return the deportees to England. It is clear that it would have been deplorable if such a claim could have been made good, and the Court of Appeal was unanimous on May 9, 1923, in recognizing that, since Ireland had obtained the legal status of a colony, deportation to it was no longer permissible under the Regulation any more than deportation to Canada would be permissible. Nothing can be more certain than that the minister, who has power to arrest and detain without trial, must retain complete authority over the person thus arrested, so that, if his power has in any measure been exceeded, he may not be able to avoid proceedings on *habeas corpus* by stating that he has no longer control of the deportee. It is fortunate that, when the House of Lords came to the inevitable conclusion that no appeal lay to it in the case from the decision of the Court of Appeal, the Irish Free State readily recognized its duty to hand over the deportees. The debate on the Indemnity Bill [1] required to save ministers and their officers from the consequence of the illegal proceedings was in every way satisfactory, since it resulted in the frank acceptance by the Government of responsibility to indemnify all those prejudiced by the illegal action taken, and in an undertaking to review carefully such exceptional powers as were still in the hands of the Government with a view to their revision.

The Legislative Powers of the Crown Colonies.—The wide ambit of the legislative power of the Crown Colonies is illustrated in a striking manner by the decision [2] of the Privy Council on March 9, 1923, not to grant leave to appeal from the decision of the Chief Justice of Gibraltar regarding the validity of the detention of the Egyptian patriot, Zaghlul Pasha, in Gibraltar under the authority of a local ordinance, enacted by the Governor, who, under the constitution of the colony, has the sole legislative power. The most favourable view of the case which could have been contended for on behalf of the petitioner was that the Crown had not the power to authorize the Governor to enact such an ordinance, or that the power actually delegated to the Governor did not extend to the enactment of the ordinance. The former contention was impossible of substantiation in view of the fact that the power of the Crown to legislate for a conquered colony is absolute, until it is parted with by the Crown. On the latter head, it was possible to contend that it was not

[1] Restoration of Order in Ireland (Indemnity) Act, 1923 (13 & 14 Geo. V, c. 12).
[2] *In re Zaghlul Pasha*, 67 S.J. 382.

a matter of consequence to the peace, order and good government of Gibraltar that a venerable statesman, who happened to demand Egyptian independence, should be interned there under an ordinance in the nature of a *privilegium*, and that accordingly the ordinance was *ultra vires*. Yet to accept this doctrine would have resulted in the enunciation of the principle that it is open to a Court to adjudicate on the issue whether an enactment is really suited to secure peace, order and good government. Nor is it difficult to realize that, if this were once admitted, the gravest difficulties must arise, and the judicature be compelled to invade the sphere of the Legislature. Extreme, therefore, as was the case, it cannot be held that it creates any new precedent; it merely recognizes that the legislative power, even where the Governor alone is the Legislature, is not subject to any limitation of its exercise on the ground that it strikes at private rights even in what seems an arbitrary and unjust manner. The security for the prevention of injustice rests, of course, on the royal power of disallowance and the executive authority exercised by the Secretary of State for the Colonies over the Governor.

Jurisdiction in Respect of Foreign States under British Protection.—The view taken by the House of Lords on March 22, 1923, of the position of sovereign States which take undue advantage of their privileges in litigation is clearly expressed in the judgment given on the appeal from the Court of Appeal in *Government of Kelantan* v. *Duff Development Company, Ltd.*[1] The Government of Kelantan came before the Court to obtain the setting aside of the award of the arbitrator appointed by the Secretary of State for the Colonies to decide alleged breaches of an agreement entered into by the Government with the Duff Development Company; it had failed to obtain such an order from Mr. Justice Russell and the Court of Appeal. As a preliminary objection to hearing the appeal it was urged for the company that, when it had attempted to recoup itself for the costs awarded to it against the Government and to enforce the award against property of the Government in the hands of the Crown Agents for the Colonies, the Government had pleaded its sovereign rights and evaded execution, and that it was unjust to permit a Government, which repudiated liability to carry out the orders of the Courts, to apply to the House of Lords. The strength of the contention was admitted by the Lord Chancellor, who suggested that, had the point been raised at an earlier stage in the proceedings, for instance when the application was made to Mr. Justice Russell to set aside the award, it might have been possible to give effect to it. As it was, however, it seemed impossible to decline to admit the appeal, for the costs of which security had been given, and the House of Lords accordingly proceeded to determine it adversely to the appellants. Importance attaches to the dictum of the Lord Chancellor in concluding this judgment, in which he insisted[2] that it was incumbent on the Government and on the Secretary of State for the Colonies, under whose control Kelantan was, to

[1] [1923] A.C. 395.

[2] P. 414.

consider carefully whether, and to what extent, the plea of sovereignty could justly be insisted upon to prevent the enforcement of the award and the orders of the Courts for the payment of costs. The case illustrates once more the extreme inapplicability to commercial arrangements of the exception from the control of the Courts of Governments, as well as the difficult position in which the Secretary of State for the Colonies may be placed when he appoints an arbitrator, and then permits a Government, which he ultimately controls, to repudiate the findings of that arbitrator.

The High Court of the Commonwealth and the Judicial Committee.—The ingenious effort on the part of the States of the Commonwealth, to which reference was made last year,[1] to question the decision of the High Court of the Commonwealth that the Commonwealth has legislative power over the employees of the States in cases where it has power over employees of other persons, and that the doctrine of the exemption of State instrumentalities has no application to these cases, has, as was then predicted, failed to win the approval of the Judicial Committee. It may be regretted that the report in *Minister for Trading Concerns for the State of Western Australia* v. *Amalgamated Society of Engineers*[2] reveals the Committee in the mere act of refusal to grant special leave to appeal from the decision of the High Court, which itself had declined to permit of the issue being brought before the Privy Council, by refusing to issue the certificate requisite under the Constitution. But it is impossible not to accept the decision as inevitable. That the issue of the exemption of State employees from federal jurisdiction is a matter affecting the relations of the Commonwealth and the States *inter se* could only be denied on a strained and technical application of terms, and sufficient of the contention was necessarily presented to their Lordships in the application for leave to appeal to render it clear that the most careful consideration could not evade that fundamental fact. It is, of course, a very different thing to contend that the case was not one suited for the grant of a certificate ; the matter at issue was essentially a decision reversing an earlier doctrine laid down with great emphasis by the Court, and in view of the change of opinion the intervention of an impartial judgment might well have been invoked. But the Court in its action of refusing to permit an appeal was merely consistent in maintaining the view that the constitutional difficulties of Australia are to be settled by the Court itself, and it may fairly be assumed that this principle will now be accepted even by the States as part of the jurisprudence of the Commonwealth. There is, of course, something illogical in the principle that the Judicial Committee should be recognized as unsuited to deal with constitutional issues, while it remains the supreme authority in all other classes of cases, but there is no evidence that the anomaly is regarded as offensive in the Commonwealth, which alone is essentially concerned.

[1] See this *Journal*, Third Series, vol. iv, pt. i, pp. 107, 108.
[2] [1923] A.C. 170.

Martial Law.—The judgment of the Court of Appeal in Ireland in *Johnstone* v. *O'Sullivan*,[1] while not adding anything essentially new, is a useful affirmation of the nature of martial law in a country which enjoys the benefits of the English common law as the basis of its jurisprudence. The case raised the issue of the validity of action taken by military authorities in Ireland during the period of active rebellion, and the essential point to be decided was whether the Courts could intervene. The matter came before the Court of Appeal on an application to revise the decision of the Court of King's Bench, and a preliminary objection questioned the possibility of appeal in a criminal matter. This was repelled on the clear ground that, as a military Court was not a Court in any legal sense, it was perfectly competent to bring an appeal to the Court of Appeal. But the Court declined to afford any relief, reiterating the doctrine that, so long as war is raging, the Courts have no power to interfere with the actions of the military in restoring order. The matter was, however, complicated by the ingenious contention that the military forces, which in the actual state of affairs were restoring order, were an unauthorized body, seeing that they were not His Majesty's regular forces, nor created by any legal enactment of a body duly empowered to legislate by an act of the Imperial Parliament. Obviously, if the Court had accepted this view, it would have been unable to apply the principle of the *Marais*[2] case to the facts. But the Court found itself prepared to accept the view that the military forces then functioning could properly be regarded as duly authorized to act by the representative of the Crown in Ireland, and that they could not, therefore, be considered as exercising illegal violence. There are obvious difficulties in the decision, but the Court may legitimately be said to have extricated a reasonable result from a situation which fortunately has had no recent parallel in British communities.

It is important to note that the right of deciding whether a state of war actually exists so as to oust the jurisdiction of the Courts rests with the Courts themselves, a fact which rendered it necessary in August for the Parliament of the Free State hastily to enact legislation authorizing the detention without trial of those persons whom it had interned on political grounds, the Court having held that the cessation of armed rebellion terminated the possibility of defending their detention on the score of martial law.

Appeals from the Free State.—The constitution of the Free State in accordance with the treaty leaves intact the right of the Crown to admit appeals from the final Appellate Court in Ireland, though it permits the Parliament of the Free State so to limit appeals to that Court as to exclude from its competence such matters as do not involve constitutional issues. It follows naturally from the purpose of the treaty and the constitution that the old practice, under which appeals on all sorts of topics could be

[1] [1923] 2 I.R. 13, *cf. R.* v. *Adjutant-General of Irish Provisional Government Forces*, [1923] 1 I.R. 5.

[2] [1902] A.C. 109. See this *Journal*, Third Series, vol. v, pt. i, p. 122.

brought to the House of Lords, is inapplicable, but it rests with the Privy Council itself to determine the bounds within which it will permit appeals. That body has, in the case of the first appeal petitions [1] presented to it, refused leave on the broad ground that the change in the status of the Free State renders it right that finality should be given to the decisions of the local Courts, save when some principle of great importance is at stake. The precedent of Canada, which governs the situation under the treaty, suggests that constitutional issues will be those which chiefly induce the Privy Council to hear an appeal.

Orientals in Canada.—The Privy Council,[2] affirming the decision of the Supreme Court of the Dominion, has asserted the constitutionality of the exercise of power by the Legislature and Government of British Columbia to insert in licences to cut timber on governmental lands a condition forbidding the employment of Chinese workers. The practice, which began as far back as 1902, was successfully challenged in the Court of Appeal of British Columbia in 1920,[3] when it was held that the condition, which was expressed to apply both to Japanese and Chinese workers, ran counter to the terms of the treaty of 1911 with Japan, which was made effective in the Dominion by a Dominion Act of 1913.[4] The Legislature, however, by an Act of 1921,[5] declared the validity of the condition, and provided for the refusal of renewal of licences to persons violating the condition. Naturally, the validity of the enactment was at once challenged by the company affected, and the Supreme Court of the province, holding itself bound by the decision of the Court of Appeal on the principle of such legislation, found in favour of the contention that the law was *ultra vires*. An appeal was taken by consent direct to the Supreme Court of Canada, which at the same time had been invited by the Governor-General to give its opinion on the validity of the provincial Act. The Supreme Court held the Act invalid[6] (Idington, J., dissenting), but reversed the decision of the provincial Court in favour of the company,[7] though the grounds of this decision were varying, and not altogether accordant. The Judicial Committee has rehabilitated the Act by holding that the power to manage the property of the province which belongs to it under s. 92 (5) of the British North America Act enables the Legislature to prescribe conditions as to the employment of classes of labour by persons granted leases of public property. The case in fact falls under the doctrine of *Cunningham* v. *Tomey Homma*,[8] and not that of *Union Colliery Co.* v. *Bryden*.[9] The distinction is doubtless difficult, and possibly evanescent, but it may be assumed that the condition had the saving grace that it applied only to government licences, and thus could

[1] *Hull* v. *McKenna* and other cases; *The Times*, July 26, 1923.

[2] *Brooks, Bidlake and Whittall, Ltd.* v. *Attorney-General for British Columbia*, [1923] A.C. 456.

[3] 29 B.C.R. 136. [4] 3 & 4 Geo. V, c. 27. [5] 11 Geo. V, c. 49.

[6] 63 Can. S.C.R. 293. [7] 63 Can. S.C.R. 466. [8] [1903] A.C. 151.

[9] [1899] A.C. 580.

not be construed, like the prohibition in *Bryden's* case, as an attempt not to regulate the employment of Chinese in the province, but to prevent them living there at all by making it impossible for them to earn the means of subsistence. Nevertheless, it is difficult not to feel that *Bryden's* case would have been decided otherwise had it arisen at the present day.

On the most important and much vexed question whether the condition in its application to Japanese subjects can be made consistent with the rights secured to Japanese by the treaty of 1911, and made effective by the Act of 1913, their Lordships unfortunately found it unnecessary to give any opinion, as the company concerned insisted equally on its right to ignore the prohibition of the employment of Chinese, and on this ground in any event had forfeited, in their Lordships' view, the right to demand a renewal of the timber licences. This particular issue, therefore, remains in a peculiarly ambiguous and inconvenient position.

NOTES ON INTERNATIONAL LAW.

The Permanent Court of International Justice.—The *Publications of the Permanent Court of International Justice* [1] constitute an invaluable source of materials for those who desire information regarding the origin, organization, jurisdiction, and decisions of the Court, and all students of international law will be indebted to the Court for having itself ordered the publication of these materials. The volumes containing them are arranged in various series, A, B, C, D, etc., and the contents are printed in both English and French, the French text appearing on the left-hand page and the English on the right-hand page. The translations have evidently been made by competent translators, and the printing is excellent. The contents of Series A are not known to the reviewer. Series B contains the texts of the opinions which have been rendered by the Court. Series C, in two substantial volumes, contains the procès-verbal of each sitting of the Court and the texts of a great variety of Acts and documents relating to the advisory opinions rendered by the Court at its first session (June 15–August 12, 1922) and at its second (extraordinary) session (January 8–February 7, 1923). Series D, No. 3, is a small volume containing extracts from international agreements relating to the jurisdiction of the Court. Among the extracts are the resolution of the Assembly of the League of Nations approving the statute of the Court, the provisions of the statute relating to the jurisdiction of the Court, an extract from the report of the Committee of the Assembly relating to the same subject, the resolution of the Assembly defining the conditions under which the Court shall be open to non-members of the League, lists of signatures and ratifications of the protocol, a list of the States which have accepted the optional clause, and the provisions of the treaties of peace, of the so-called minorities treaties, of the mandates and various treaties, conventions and political agreements, which confer jurisdiction on the Court. A reading of this volume impresses one with the fact that the Court possesses in fact a very considerable "obligatory" jurisdiction, notwithstanding that the statute confers upon it jurisdiction of only such cases as the parties may voluntarily submit to it.

The opinions to which the documents printed in Series C relate are four in number, and they are all advisory in character. They are:

[1] A. W. Sijthoffs Publishing Company, Leyden.

first, whether the workers' delegate for the Netherlands at the third session of the International Labour Conference was appointed in accordance with the provisions of Article 389 of the Treaty of Versailles; second, whether the competence of the International Labour Organization was intended to embrace international regulation of the conditions of labour of persons employed in agriculture; third, whether proposals for the organization and development of methods of agricultural production and other questions of a like character fall within the competence of the International Labour Organization; and fourth, whether the dispute which had arisen between Great Britain and France concerning the so-called nationality decrees promulgated in Tunis and Morocco (French Zone) on November 8, 1921, and their application to British subjects was or was not by international law solely a matter of domestic jurisdiction, in the sense of Article 15 of the Covenant of the League of Nations, which excepts from the jurisdiction of the Council of the League disputes arising out of matters which by international law are solely within the domestic jurisdiction of one of the parties. Each of these questions was submitted by the Council of the League to the Court for an advisory opinion, in accordance with the terms of Article 14 of the Covenant, and opinions on all of them were duly rendered by the Court. Since the volumes containing them are not accessible to the reviewer, they are not dealt with in this note. At the request of the Court a number of eminent lawyers, among them Sir Ernest Pollock and Mr. G. J. Talbot, K.C., of England, appeared before the Court and argued the first question. Representatives of the Dutch Government, of the International Labour Office, and of various industrial organizations likewise appeared and argued one side or the other of the question. Their arguments together with a mass of documents printed in both English and French will be found in the collection under review. The question regarding the competence of the International Labour Organization was raised by the French Government, which objected to the extension of the jurisdiction of this Office to cover the regulation of agricultural labour, not only because the French Government considered that such labour must be treated on a different footing from other forms of industry, but also because, according to its view, such an extension of jurisdiction was not legally warranted by the terms of the provisions of the treaty creating the International Labour Organization. M. de Lapradelle appeared before the Court as the representative of the French Government, and made a lengthy argument in behalf of this view. His view was supported by the arguments of a representative of the Hungarian Government, a representative of the International Agricultural Commission, by an opinion of M. Charles Dupuis, and by mémoires of the French Government and of the French Society of Agriculturists. On the other hand, Mr. G. J. Talbot representing the British Government, a representative of the Portuguese Government, and M. Albert Thomas, Director of the International Labour Office, appeared and maintained the

contrary view. Altogether the question was ably and exhaustively argued. Some who read the lengthy discourses and mémoires addressed to the Court will find it difficult to avoid the feeling that the attention bestowed on the question was out of all proportion to its importance.

Nevertheless, an important principle was involved, namely, whether, at the very outset, one of the organs of the League should be allowed to extend its competence beyond the limits fixed by the treaty creating it. It was well, therefore, that the legality of this first attempt of the kind should have been contested and brought before the Permanent Court for its opinion.

The fourth question, that raised by the dispute between Great Britain and France regarding the nationality decrees in Tunis and Morocco, was in some respects the most important of the four that had been brought before the Court, since it had led to an irritating controversy, during which one of the parties had been charged by the other with "unfriendly proceedings." France had declined to submit the dispute to arbitration in accordance with the terms of the Anglo-French arbitration treaty of 1903, for the reason that it involved political as well as legal questions, and for the same reason she declined to regard it as a dispute which was "suitable for arbitration" under Article 13 of the Covenant of the League of Nations. Thereupon the British Government invoked Article 15 of the Covenant, which requires the submission to the Council of the League of disputes arising between members, when such disputes cannot be settled by diplomacy. But to this proposal the French Government objected on the ground that the dispute had arisen out of a matter which by the terms of the Covenant falls entirely within the domestic jurisdiction of France, and was therefore one over which the Council of the League had no jurisdiction. At this juncture, Mr. Balfour and M. Bourgeois, both members of the Council, reached an agreement to have the question, whether the matter out of which the dispute had arisen was one which fell within the domestic jurisdiction of France, submitted to the Permanent Court. It was also agreed that if the opinion of the Court was in the negative, the merits of the controversy should be submitted to arbitration or judicial settlement. Sir Douglas Hogg and Sir Ernest Pollock, representing the British Government, appeared and argued that the effect of the French decrees being to impose French nationality on certain subjects of Great Britain against their will and against the consent of the British Government and thereby rendering them liable to French military service, they were neither in accord with international law nor international comity.

M. de Lapradelle appeared for France and, in a speech running through a considerable part of three days, argued that the whole matter of conferring nationality, like immigration and naturalization, was one of domestic concern, which falls within the exclusive competence of the territorial sovereign. He did not confine himself to the preliminary question as to whether the matter out of which the dispute had arisen was

or was not within the domestic jurisdiction of France, but reviewed at great length the merits of the dispute, and asked the Court to give an opinion on these as well as on the preliminary question. His argument contained a full examination of the *jus soli* and *jus sanguinis* rules governing the acquisition of nationality, the nature of protectorates, and a history of French policy in Tunis and Morocco. The Court, however, confined its opinion to the preliminary question submitted to it without passing on the merits of the controversy. The decision was against the French contention; but an agreement based on the opinion of the Court was reached by the two Governments by an exchange of notes on May 24, 1923.

JAMES W. GARNER.

Report of the 31st Conference of the International Law Association.[1]— The 31st Conference was held at Buenos Aires, in the Argentine Republic, from August 24 to 30, 1922.

Vol. I of the Report contains a preface; an account of the origin, objects, and constitution of the Association; lists of the council, officers, committees, and branches of the Association, and the names and addresses of its members; particulars of the persons attending the Conference at Buenos Aires and of the Bureau of the Conference; reports of the preliminary and closing meetings; the texts of the papers submitted and short reports of the discussions and resolutions following their submission; the report of the Executive Committee of the Association; financial statement; and index.

Vol. II relates to the Proceedings of the Maritime Law Committee of the Association. It contains lists of the members, officers, and subcommittees of the Maritime Law Committee; a report of the work done from September 3, 1921 to June 12, 1922; reports of various meetings and conferences held in connexion with the campaign for bringing into operation the draft "Hague Rules" for defining the risks to be assumed by sea-carriers under bills of lading; and reports of papers and discussions in the Maritime Law Section of the Buenos Aires Conference. The Hague Rules, which were drawn up by the Maritime Law Committee and adopted by the Association at The Hague Conference in September 1921, form by far the greater part of the subject-matter touched upon in this second volume.

Perhaps the most interesting feature of these volumes is the evidence they afford of the vitality and the widening activity which the Association is displaying under the able guidance of Professor Hugh H. L. Bellot and his co-honorary secretary, Mr. G. G. Phillimore. Dr. Bellot acted as leader of the British delegation at the Buenos Aires Conference. He also contributed one of the most important papers discussed by the Conference, advocating the establishment of a Permanent International Criminal Court.

The Conference is stated in the preface to have been probably the

[1] Published by Sweet & Maxwell, Ltd., 3, Chancery Lane, W.C.2. Price to non-members: Vol. I (569 pp.), £1 5s. net; Vol. II (210 pp.), 15s. net.

most "international" in character ever held by the Association, forty States being represented, and forty-five members, representing no fewer than a dozen European countries, besides a number of eminent jurists from the United States of America, having travelled thousands of miles in order to attend the Conference.

Dr. E. S. Zeballos, President of the Association and formerly Minister of Foreign Affairs and of Justice in the Argentine Republic, presided over the Conference. To his energy and ability, to the enthusiastic help given by the Argentine Branch, and to the generosity of the Argentine Government in assisting to lighten the financial burdens involved, a good deal of the success achieved by the Conference is attributed.

The Conference met at a time when the Pan-American movement for the uniformity of law throughout the Americas was beginning to involve the danger that two different systems of law might be created, dividing the world into two sections, with resulting risk of discord and antagonism between these sections. In this situation the Conference performed an admirable service in helping to link up the New World with the old, and emphasizing the universality of International Law. Dr. Zeballos, in the course of a striking paper on the "Réorganisation Juridique de l'Humanité," refers to the important influence which can be exercised by persons of international mind and sympathy among the independent peoples of America in contributing to the reconciliation of peoples and Governments divided by the war, and to the reconstruction of the fallen temple of international law.

The opening paper was one by Dr. Daniel Antokoletz, of Argentina, on "The League of Nations," in which he advocated revision of the provisions of the Covenant as to admission of States to the League, with the object of facilitating the acquisition by the League of a character of universality. He also suggested that the Assembly of the League should be entrusted with the mission of progressively codifying international law, and that the security for peace afforded by the creation of the Permanent Court of International Justice should be rendered effective by an extension of the provisions of the Covenant in the direction of the compulsory submission of all international disputes to arbitration or judicial settlement. He contended that until the League had acquired a universal character and had accepted the obligation of submitting all international disputes to arbitral or judicial solution, the general plan for reduction of armaments contemplated by Article 8 of the Covenant ought to be based on the allowance of such forces and armaments, military, naval, and aerial, as each member should itself signify as the minimum indispensable for its defence.

Dr. Antokoletz's paper gave rise to considerable discussion, at the end of which a resolution was passed that a committee be formed, called "The League of Nations Committee," with the object of studying the statutes of the League and reporting any improvement in them which the Committee might think desirable.

A paper written by Lord Phillimore was, in his absence, presented by Dr. Bellot. It dealt with three resolutions, which were adopted by the Committee of twelve jurists by whom the statute of the Permanent Court of International Justice was drafted. After discussion, the first of these resolutions was referred to the Codification Committee of the Association. It advocated a new Conference to be held at The Hague for four purposes: (1) to reaffirm the principles of International Law, especially those relating to the Laws of War as they were affected by the conduct of operations in the late war; (2) for determining changes occasioned by the war in international life and intercourse; (3) for securing agreement relating to the "Rules" which gave rise to disputes during the war; and (4) for considering points as yet unsettled.

Dr. Bellot's paper, mentioned above, was a carefully reasoned and convincing argument for the creation of an International Criminal Court, to be constituted on a basis which he outlined. He advocated that the jurisdiction of the Court should be as wide as possible. It should be competent to try criminal offences against law and order during peace time at the suit of any State, on behalf of its injured nationals, in those cases where such State has no jurisdiction over the alleged offender. It should also be competent to try all war crimes after the conclusion of peace at the suit of the State on its own behalf and on that of its nationals. Every State should have unconditional access to the Court; and every individual should be entitled to set his own State in motion, provided he obtains the fiat of the Public Prosecutor or Law Officers of his own State. Dr. Bellot entirely dissented from the proposal of The Hague Committee of Jurists that such a Court should deal only with cases referred to it by the Council or Assembly of the League of Nations. The law to be applied by the Court should be based upon "the principles of the Law of Nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience," to use the words contained in the preamble to The Hague Convention.

Dr. Bellot proposed a resolution, "That in the opinion of this Conference the creation of an International Criminal Court is essential in the interests of justice, and that the Conference is of opinion that the matter is one of urgency." The proposal gave rise to considerable discussion, in the course of which Dr. Bellot said that, as cases during peace time would be very rare, he was willing, if the Conference so thought, to limit his motion to jurisdiction over the laws of war. On this footing the resolution was eventually passed by 31 votes to 22, and Dr. Bellot was instructed to draft a Statute for the creation of such a Court and submit the draft to a Committee of the Association.

Space does not permit reference in detail to other papers. The volumes contain much important matter, and are ably edited and truly international in character, the greater part of their contents being in English or French, but some little Spanish and German being interspersed.

F. N. KEEN.

The Machinery for Unification of Laws.—An article on the Unification of Maritime Law, in the second number (March-April) for 1923 of Clunet's *Journal du droit International*, brings to mind the disadvantages that lie in the overlapping of various forms of machinery for harmonizing the national laws of different States.

The writer of the article is M. Georges Ripert, Professeur à la Faculté de Droit de Paris et à l'Ecole des Sciences Politiques. He refers to the start made in this matter before the war by the Convention of 1910 for the saving of life at sea, and describes the organization through which this Convention was arranged. The International Maritime Committee, founded at Brussels in 1897, directed the organization, and was assisted by a national association in each country. It held conferences at irregular dates, the last before the war being one at Copenhagen in 1913. The work was resumed at the Conference of Antwerp in July 1921 and continued at the Conference of London in October 1922. The International Maritime Committee prepares the official business. The Diplomatic Conference of Brussels is charged with the duty of getting it put into operation. A Commission, which had assembled at Brussels in 1913, had elaborated certain projects with a view to a new Conference. These projects were submitted to the 1922 Conference. This Conference was called for the purpose of preparing conventions on the responsibility of shipowners and maritime priorities and mortgages. It enlarged its own programme by studying the rules as to bills of lading and the responsibility of sea-carriers.

The International Law Association is another body which has for a long time occupied itself with the unification of maritime law, preferring the plan of model forms of contract. This Association, at its meeting at The Hague in September 1921, had adopted the now famous "Hague Rules," which were submitted afresh at the Buenos Aires meeting in August 1922, and, after a rapid passage through the International Maritime Committee, came before the Diplomatic Conference.

Harmony between the two organizations already mentioned is secured by reason of the fact that the Maritime Committee of the International Law Association forms the English national association affiliated with the International Maritime Committee.

More recently a new organization of unification has appeared. It is the International Labour Conference convened by the International Labour Office of the League of Nations. The Conference at Washington in 1919 recognized the necessity of a special regulation of maritime labour. Three draft conventions were voted at the Genoa Conference in 1920 and two more at the Geneva Conference in 1921. The products of these conferences have made considerable progress towards ratification as international conventions. A maritime commission has been established for preparing the work of the conferences.

M. Ripert's article proceeds shortly to describe the details of the

draft conventions elaborated by these several organizations, but with those details at the moment we are not concerned.

The question of procedure and machinery is of immense importance. Maritime law is but one of many branches of law upon which a world-wide unification of national laws would make for the great convenience and benefit of humanity. In other branches, as well as this, the work of unification is likely to be complicated and retarded by the existence of various organizations labouring in the same field. Moreover, the whole process of unification of laws is likely to be conducted more simply, economically, and effectively if the machinery for dealing with all branches of law is itself unified as far as possible. The League of Nations seems the proper " clearing-house " for all matters of this kind, and the sooner the League takes up systematically and comprehensively the work of negotiating general conventions for the unification of laws, and provides, or at the least co-ordinates, the whole machinery for the purpose, the better it will be for the world in general. F. N. KEEN.

Codification of Private International Law.—In the *Revue de Droit international et de Législation comparée*, 1923, No. 1, among other interesting matter there is an important essay by Dr. Josephus Jitta, Councillor of State at The Hague, on the need for consolidating and extending the work of The Hague Conventions for the codification of Private International Law. These were adopted by the great majority of the Continental States of Europe as the result of a series of Conferences held at The Hague in the years 1896–1905 ; and they enunciated rules for general adoption, (1) in civil procedure, and (2) in solving conflicts of law as regards marriage, the matrimonial regime of persons and property, divorce and separation, and guardianship of minors and interdiction of persons of full age. Before the Great War, however, some States had withdrawn their adhesion to them, and the Peace Treaties have only expressly revived the first-named. The learned author urges that the Peace Treaties support the principle that the States who were opposed to each other in the war should again collaborate in the field of common social interests, and the subjects of the conventions other than those expressly mentioned require similar treatment, *e.g.* marriage, especially marriage between persons belonging to different nationalities, and matters which are complementary to the legal relations of family life such as natural parentage and filiation, and the succession to property of deceased persons—for which the last Hague Conference had actually drawn up a set of rules. There are also the questions involved in *Commercium* as well as in *Connubium*, the laws governing dealings with movable and immovable property, intangible property like patents, copyrights, trademarks, contracts of land and sea carriage, insurance, companies and their branches abroad, cheques, bills of exchange, bearer bonds and bankruptcy, all of which are of international effect and importance. As regards the procedure for carrying this into effect, he thinks that for the

codification of international family law, the system of unification of law is not possible, as it is with regard to many of the commercial subjects above mentioned; and that, therefore, the method already adopted by The Hague Convention is the best, viz. a treaty which is given the force of law in the respective countries which are parties to it. He regards nationality as the pivotal principle of conventions on family law; and while he has to admit that, if this is so, the idea of a universal union of nations which will embrace the English-speaking races and the greater part of the South American Continent is not for the moment feasible, he thinks that the principle of *Renvoi*, by which the national law of the individual is allowed to refer the question of the proper law applicable in the particular case to the law which it recognizes for that purpose, *e.g.* that of the domicil for British subjects, may continue and be a means of reconciling the rival standards of nationality and domicil. He recognizes, too, that the principle of nationality, however prima facie simple, bristles with difficulties in its application to many particular points of international relations of individuals, *e.g.* the nationality of husbands, wives and children: and there are the further difficulties caused by the principle of "public order," which is invoked as a reason for a State applying its own law to foreigners within its jurisdiction instead of their own national law, and by the conflicting decisions of the Courts in the different countries on the Conventions themselves. But, in his opinion, the work of consolidating them should go forward; the new European States should be brought within the union, and the older States which have left it should be brought back to it. The learned author, who speaks with peculiar authority on the subject as a jurist of international reputation and experience, has at all events made a strong case for a renewal of the attempts to obtain international agreement on various points of family law, and the League of Nations might allow itself to be made the medium for this important step forward in the scientific progress of a common system of Private International Law.

G. G. Phillimore.

Laws of War.—Two recent numbers of the *Revue Internationale de la Croix Rouge* contain important contributions on subjects of great practical interest in the Laws of War.

The first is a brief account of the new Military Penal Code of the Netherlands by Lieutenant-General P. P. C. Collette, Chief Commissioner of the Red Cross Society of that country. While acknowledging the valuable effect of the Geneva Red Cross Convention of 1906 and The Hague Conventions of 1907 with regard to the laws of land warfare and the rights and duties of neutrals upon public opinion in restraining abuses of the laws of war, the author thinks that there should be definite positive sanctions as well, in order to guarantee the observance of the laws of war, and that the realization of this aim would be considerably promoted if persons guilty of violation of the Conventions were held personally

responsible and made justiciable by their national Courts, and this would depend primarily on the rules of criminal law adopted by the different States. There is a provision to this effect as regards States in The Hague Land-war Convention of 1907 and an undertaking by them that they would give instructions to their land forces which would be conformable to the regulations of the Convention; but there is none such in the Convention relating to neutrals in case of land warfare; and the Red Cross Convention only provides for punishing by military law breaches of certain of its provisions. The author then calls attention to the main provisions of the Code and claims that they are conceived in a liberal spirit and guarantee humane treatment of prisoners of war. The Code, which came into force January 1, 1923, applies to all persons subject to military jurisdiction, including members of a military force of a belligerent Power interned in the Netherlands during a war in which the Netherlands are not engaged.

The second subject is one which requires early attention from international lawyers and from Governments, viz. the position of civilians who in time of war fall into the hands of the enemy: and Dr. F. Ferrière, of the International Red Cross Committee, discusses the proposal for an International Convention on this subject, made at the Red Cross Society's Conference at Berne in 1921. That meeting expressed the hope (*vœu*) that the various Governments should at the earliest opportunity conclude a diplomatic convention with regard to prisoners of war and deported, evacuated and refugee persons, defining their juridical position and laying down rules governing their status, which should include a code of disciplinary and penal rules applying to prisoners; and a commission was appointed to draw up a project following certain "basic" principles enunciated by the Conference, and utilizing the agreements made by the belligerents during the war and other materials laid before the Conference. Eventually a draft code dealing with prisoners of war only was prepared, the commission being of opinion that the other classes of persons above-mentioned should be dealt with by a separate Convention. The learned author then refers to the actual treatment of civilians in the late war who fell into the hands of the enemy, especially at the outbreak of the war and the want of any international regulation for their treatment, for The Hague Convention did not contemplate the possibility of detention of enemy subjects, and only the repeated efforts of the International Red Cross obtained the same privileges for civilians, as for military prisoners; and the similar position of inhabitants of occupied territory, and deported and evacuated persons. He then cites the various agreements made between the belligerents, which included civilians as well as military prisoners in their scope, *e.g.* that between Great Britain and Turkey in December 1917, the Anglo-German agreement at The Hague in 1917 as to internment in Holland for invalid interned civilians, the agreements between France and Germany and Austria and Serbia respectively, and as regards civilians in occupied territory those between France

and Germany, and Austria and Italy in 1918 respectively. He considers these pacts as evidence of the necessity felt by the belligerents, tardily it is true, for giving civilians the benefit of the protection accorded to military prisoners, and the possibility of obtaining from civilized Governments formal undertakings in the matter. He fully supports the humanitarian principles laid down by the International Red Cross Conference, viz.: (1) that only military persons and civilians who under existing laws can be called to arms at once or within a year can be considered as prisoners; (2) that deportation of civilians can only be applied to individuals for personal offences duly defined and necessitating this measure; (3) that the taking of hostages from the civil population should be prohibited, especially the deportation of civilians as "political prisoners"; and (4) that reprisals should be absolutely forbidden and the State instituting them should be regarded as violating the laws of war. But he recognizes that modern war is no longer a war between armies but a struggle between peoples, and thinks that the civilian may be likely in the future to receive as little consideration as he did in the last war, and we must therefore be content with the hope that general international agreements like those of The Hague and Geneva as regards military prisoners may come in time to mitigate the lot of the civil population to some extent. The agreements made between the belligerents in the last war have shown the urgency of measures for putting the civilians on the same footing as military prisoners in the matter of accommodation, food, employment, pay, visits by neutral commissions, receipt of help from outside, and the repatriation of all prisoners who cannot do injury to the captor State (women, children, sick persons, etc.), and who need not be detained there longer than is necessary for sifting dangerous persons from harmless ones. For all these the recommendations of the Red Cross Commission's report as regards military persons might largely be adopted. As regards inhabitants of occupied territory, the experience of the agreements above cited shows that the captor State can grant them a minimum of normal life, protection against abuses by arbitrary measures, strict limitation of their evacuation and deportation to the requirements of strategic necessities, correspondence with the home country under organized control, receipt of material help from outside, repatriation to non-occupied territory, organization for securing a normal system of removing civilian persons who are without resources, abolishing political prisoners as a class, the humane treatment of hostages (if indeed hostages are to be taken in future) taken from the civil population of occupied territory, not taking as hostages women or sick or infirm persons and not allowing any reprisals at all, or not at least against civilians, especially women, and then only after warning sufficient to admit of the completion of negotiations already begun.

The last subject in this connexion is the text of the draft code for prisoners of war drawn up by the Red Cross Commission already mentioned, which is set out with an explanation by Dr. Albert Reverdin,

a member of the International Red Cross Committee. The Commission enumerates in its Report, among the materials of which it availed itself, besides the War agreements, the "very remarkable" project of the International Law Association on this subject formulated at its Conference at The Hague in 1921, as well as a similar contribution by the Russian Red Cross Society, and states that the three different bodies all working independently came to practically the same conclusions. The code has as far as possible reproduced the provisions of the war agreements, and though it contains 105 articles, is drawn on clear and concise lines. It defines the objects of its provisions (prisoners of war) by reference to The Hague Convention of 1907 on land war. After stating general principles for their treatment, it deals with its subject under the following heads: capture, captivity including evacuation of prisoners' depots (places of confinement), and their equipment; prisoners' employment; their relations with external affairs and with the captor State authorities; the termination of captivity, *e.g.* exchange, liberty on parole, liberation and repatriation and death. Certain classes of civilians are brought under the Convention; and to ensure execution of the Convention, there is a remarkable provision for entrusting to itinerant Commissions composed of neutrals the task of supervising the belligerents' fulfilment of their obligations.

Only a few of the more striking provisions, which mark a definite advance on The Hague and Geneva Conventions, can be noticed, and their comparison with the Regulations of the International Law Association noted. By the Code all reprisals against prisoners are forbidden: by the Regulations they are deprecated, and if they are taken or threatened the captor State must notify and justify them to the protecting Power, which is bound to endeavour to eliminate the reasons for them, and in no case are prisoners to be subject to reprisals except in retaliation for their own Government's acts in its treatment of prisoners. By the Code prisoners have a right to respect for their personality and their honour and retain their full civil capacity: they are also protected against propaganda, religious, political or civil, aimed at injuring their country. No differences of treatment are allowed other than those based on military rank or physical and intellectual health or professional qualification.

On capture no compulsion is allowed in order to obtain information regarding their army or country, and no penalty attaches to their refusal to give it. They must be evacuated as soon as possible to depots more than 30 kilometres from the line of fire (the I.L.A. rules prescribe removal out of the range of field artillery); and they can only be kept at a lesser distance, temporarily, on account of wounds or illness. If captured in a region which is unhealthy in its climate, or dangerous to prisoners coming from temperate regions, they must be removed to a more healthy climate. Notification of capture is to be made to their Government as soon as possible (the I.L.A. Rules say, within a month). In the depots, prisoners belonging to different States are not to be confined together if

it can be avoided, and prisoners belonging to the same family are to be confined together. As regards the conditions of confinement, there is to be an infirmary in every depot and means of isolation provided in case of contagious illness. By arrangement between belligerents, doctors and infirmary attendants, who are compatriots of the prisoners, may be detained by the captor State in order to attend to them. No collective disciplinary measures relating to food are allowed. Full religious liberty is granted to prisoners, and intellectual and recreational diversions are to be encouraged; the powers of commandants of depots are to be regulated on uniform lines; the prisoners' own language to be used in all orders and notices; private soldiers are to be employed for service in officers' camps, and officer prisoners are allowed on giving parole to take exercise outside the depot; prisoners are only to be moved from one depot to another in the case of necessity for urgent and serious reasons. The conditions of prisoners' employment are stated in detail. Except officers, all prisoners can be used by the captor State as workers; prisoners are to be employed in work corresponding to their profession in civil life, or if not, as far as possible in agriculture. Those of superior intellectual culture or members of liberal professions are not to be put on laborious bodily work, and their health is always to be considered in assigning employment to them; they are not to be employed within 30 kilometres of the line of fire; the duration of their work is not to exceed that of the civil workers in the country; they are not to be employed on work which is unhealthy or dangerous; and any aggravations of conditions of work as a disciplinary measure is forbidden. The Red Cross Code goes into considerable detail on the subject of the relations of prisoners with the captor State authorities, viz. the right to complain to the military authorities and the representatives of the protecting Power and their right to have regular delegates for this purpose; they are subject to the military law of the captor State, but are exempt from any punishment which is purely degrading or corporal, and from any privation or restriction of food (except a bread-and-water regime for disciplinary punishment which is strictly limited in duration); judicial and disciplinary punishments are kept distinct; and punishment for attempt to escape is limited to the offenders only. As regards termination of captivity, the Code makes obligatory the repatriation of prisoners so wounded or sick that they are incapable of military service for at least a year; it gives a detailed list (21 heads) of sicknesses or other causes entitling to repatriation, including accidents happening in their employment; and it provides for the exchange, by agreement between the belligerents, at the latest two years after their capture, of prisoners who are in the captors' country or are interned in a neutral country. The Code is also applicable to civilians found in the captors' country at the outbreak of war who are capable of mobilization and may have their liberty restricted or taken away from them, and its provisions are to be published in every depot in the prisoners' language.

The Code anyhow will have a value as representing a conscientious endeavour to supplement the admittedly inadequate existing international agreement on this subject; as compared with the parallel work of the International Law Association it may be regarded as embodying the maximum, while the Association's draft may stand for the minimum, of humanitarian legislation on the subject. The latter was intentionally restricted to an enunciation of practical rules which were thought capable of being carried out even in circumstances of intensified national feeling and of the supremacy of military ideas and measures, and suggestions similar to some of the new provisions in the Red Cross Rules were, after consideration, omitted from those of the Association. On the other hand, in certain respects the latter contains provisions likely to be of value which do not find a place in the Red Cross Rules, *e.g.* its recommendations that the belligerents should confer together from time to time during hostilities through the medium of the protecting neutral Powers acting for them respectively; that there shall be no collective punishments for the acts of individuals, as distinct from collective withdrawal of privileges; and that reports on the conditions of prisoners are to be made by the commandants of depots to the captors' State authorities which shall be open to the inspection of the protecting Powers. The Red Cross Commission may be congratulated on having made a substantial contribution to the materials for a new Hague Convention on this subject; and perhaps they may be able to supplement it by a like endeavour to formulate the rules that should govern enemy civilians whom a belligerent Government finds it necessary to put under restraint.

Capture et captivité des prisonniers en cas de guerre continentale, by M. Gaston Jaccard, of the Ministry of Foreign Affairs, Berne, Aigle imprimerie, J. Borloz, 1922. This essay, which the author presented as the thesis for his doctorate to the University of Lausanne, is a careful study of the status of prisoners of war. It is remarkable for its comprehensive survey of the whole question, and its reasoned examination of the juridical position with all the incidents involved in it, and it should be of interest to military authorities no less than to lawyers as dealing with a question which in the present state of international affairs cannot be regarded as merely academical. The book opens with an historical sketch of the development of the law of capture beginning in Roman times, when captives were at the absolute disposal of the captors, the growth of the present legal conception of prisoners as having a definite legal status, and the evolution of the right of a surrendering enemy combatant to protection from its original character as an act of grace of the captor. The author then describes the actual law in force regulating captivity in war; the active and passive subjects of the right of capture, viz. to whom the right belongs (the State) and against whom the right is established (States and individuals); the material objects of the right, viz. enemy persons taking part in hostilities who may be regular or irregular combatants or the sanitary personnel of an army or enemy; persons of passive

character such as the civil population ; the power of the captor over the prisoners, the nature of captivity which is now reduced to a temporary deprivation of liberty, and merely a measure of security for diminishing the enemy forces in the war, the treatment of prisoners after capture ; their detention, with its incidents of accommodation, food, sanitation, the treatment of officer prisoners, correspondence, juridical capacity, employment, discipline and protection ; the juridical position of wounded and sick prisoners and their internment or hospitalization in neutral countries ; the internment of prisoners generally in neutral countries whether they be combatant members of the belligerent armies entering neutral territory, or escaped prisoners, or prisoners brought by their captors on to neutral territory, or prisoners remitted by the captor State to a neutral State ; their freedom on parole and finally the cessation of the captors' power over prisoners by their liberation.

It would only be repeating what has already been said above to refer in detail to the law on this subject : it must suffice in connexion with M. Jaccard's work to say that it covers the whole ground of the subject, and notice can only be directed to a few points. The author does not hesitate to advocate changes in and additions to the existing law, *e.g.* he regards as unsatisfactory the provisions of The Hague Convention putting prisoners on the same footing as regards discipline as soldiers of the captors' army ; he would prohibit collective punishments for individual acts ; he emphasizes the importance of having representatives from neutral States to supervise the conditions under which prisoners are kept ; and in the case of escaping prisoners he would have the neutral States, into whose country they come, take measures to prevent them rejoining their own army instead of leaving them at liberty. The book is written with a pleasing clearness of thought and expression, and it should be a valuable addition to the library of any student of the laws of war.

G. G. PHILLIMORE.

Revista de Derecho Internacional.—The June number of the *Revista de Derecho Internacional* of Habana is one of distinct merit. The earnestness of the Cuban leading citizens and politicians is evidenced by the contents of most of the papers in the number, among which we may mention that on International Co-operation by Dr. Carlos Manuel de Céspedes, Foreign Secretary of the Republic, a very valuable report on the genesis, mission and importance of the League of Nations by Dr. Antonio S. de Bustamente, Judge of the Permanent Tribunal of International Justice, and an exhaustive treatise by Dr. Gustavo Gutierrez, Professor of Public International Law in the University of Habana, on the theme—Is war susceptible of repression ? The subject is well treated, historically and philosophically, and deserves to be read. The main conclusion is that while war cannot be suppressed, it can be generally avoided. A résumé of the doings of the fifth Pan-American Conference, held in Santiago de Chile, follows.

WYNDHAM A. BEWES.

Annuaire International de Législation Agricole.[1]—In the world's legislation on Agriculture for the years 1921 and 1922 it is difficult to trace any general principles. Each country deals with its own problems in its own way. As compared with the legislation of the seven preceding years, one fact is common to all countries. The emergency measures of the war are abandoned, and the new laws are framed on the basis of the normal conditions of peace.

If there is one tendency which is so marked as to be almost universal, it is the increased subordination of rights of private property, not merely to the exigencies of public utility, but in conformity with national aims of social development. Specially noticeable in the case of newly formed nations, it is also a feature in the legislation of older and more settled countries. Almost everywhere there has been an extension of State interference with property rights. The strict rules which regulated expropriation in the public interests have been relaxed for the promotion of land reform and land settlement.

When so much has been torn up by the roots on the Continent of Europe, it is easy to try experiments. But the methods which have been adopted by newly formed or reconstituted nations are not without interest for States which, without their complete separation from the past, have to face the similar problem of maintaining or increasing the population on the land.

In the older and more settled countries like France and Denmark, legislative efforts are concentrated, in the main, on assisting and preserving the existing rural holdings. Thus the French legislation of 1920 for granting agricultural credit and promoting co-operation is enforced by regulations as to procedure. But by other laws the system of State credit is applied to facilitate the purchase of dwellings or of small holdings for direct cultivation, and also the purchase, transformation, and reconstruction of small farms not exceeding 40,000 francs in value. Loans for the first-mentioned purposes are granted up to 70 per cent. of the cost of the property at from 2 per cent. to 2½ per cent., and must be repaid within 40 years. In Denmark the Ministry of Agriculture is empowered to sell Crown lands and apply the proceeds of the sale to the purchase of other lands for the formation of new rural holdings. It also, by another law, restricts the subdivision of existing holdings, wherever such subdivision would reduce the holding below the prescribed limits. In this case, lots can only be detached and sold when another area of similar size and value is added to maintain the total. Bavaria, again, seems to be faced with difficulties like those which our Enclosure Acts were mainly designed to meet. The different lots which make up the total areas belonging to the respective small owners are scattered at inconvenient distances and in minute portions. As a consequence, farming suffers and production is diminished. Three attempts have been made to deal

[1] XI^ème Année, 1921; XII^ème Année, 1922. Rome: Imprimerie de l'Institut International d'Agriculture, 1922, 1923.

with the problem. The third (Aug. 1922) renders the exchange and consolidation of holdings into compact blocks dependent on the universal consent of the owners. But the consent may be waived, and consolidation made compulsory with regard to the whole territory of any particular commune, where one-third of the owners of one-half the area demand it and can show that the desired results can be secured in no other way.

The newer countries are less concerned with helping or preserving small farms than with creating or multiplying the class of farming occupiers, mainly owners. An Austrian federal law of 1921 gave the tenant of a farm, which he had occupied uninterruptedly since January 1, 1880, the right to purchase. As a last resort, the price will be fixed by the officials on the basis of the rent charged to the tenant. A Decree of the Republic (Nov. 1921) requires communes to draw up lists of all lands in their districts which have been taken from the peasants since 1870, and are now used for speculative, pleasure, or sporting purposes, or have been added to estates above a prescribed size. The lists are to be published, and Austrian citizens—individual farmers, co-operative associations or public bodies—may demand the expropriation of the owners. Compensation to the expropriated owners is to be granted on the basis of the income derived from the land as assessed to income tax for the years 1915–21, the price to be such as to make it possible to farm the land profitably without enabling the purchaser to enrich himself at the expense of the expropriated owner.

Bulgaria (May 1921) boldly bases land-ownership on labour. No one is to own more land than he can cultivate himself with the aid of his family and with occasional seasonal help. Communal Commissions are set up charged with the duty of notifying all lands which are not cultivated direct by the respective owners. Such lands are to be immediately taken over by the State, and reassigned by the same Communal Commissions to cultivating occupiers. The expropriated owners are to be compensated on the basis of the average market values from 1905 to 1915, subject, however, to a deduction which rises from 10 per cent. to 50 per cent. in proportion to the size of the expropriated property. A subsequent Decree (Sept. 1921) gives the procedure and regulations for carrying the law into effect.

Similar, but less drastic, laws regulate rural holdings in Central Lithuania, Latvia, Czecho-Slovakia, and Poland. Generally speaking, all lands in excess of a prescribed limit are expropriated, and redistributed on payment of compensation to the former owners. The Rumanian legislation of 1920–21 is the more interesting because of the large export trade in wheat. It aims at securing to all farmers a lot of 12½ acres inclusive of what they at present hold. The question would seem to arise whether such an area is large enough for the maintenance of the present wheat crop. The very interesting law of July 1921 begins with 9 chapters, devoted to such subjects as the reasons for expropriation, its limits, communal grazing grounds, and similar topics.

Other points might be selected in the vast mass of agricultural legislation. But the subject which I have chosen to illustrate the direction in which other countries are moving agriculturally, and of their attitude towards both the economic and the social sides of the land problem, seems to be the most interesting to Great Britain at the present moment.

ERNLE.

Nationality of Married Women.

[*Contributed by* G. G. PHILLIMORE, ESQ.]

THIS question has come into prominence owing to the activities of various women's organizations for the purpose of establishing complete equality between the two sexes: and the International Women's Suffrage Alliance has put forward, as a basis of criticism, a provisional draft International Convention for consideration at a general official International Conference. The idea has been also discussed by jurists and most recently by the International Law Association. At its Buenos Aires Conference of 1922 a resolution proposed by a French delegate was carried, that it is desirable to fix uniformly by treaty the nationality of married women, reserving to a married woman, as far as possible, the right to choose her own nationality. At the London Conference of 1923 a paper by Dr. E. J. Schuster, K.C., on this subject was read, which proposed for reference to a Special Committee the following matters for inquiry: whether marriage should affect the nationality of a woman from the point of view of avoiding conflicts of laws, and, if not, how should the present general rule that it has that effect be modified? Dr. Schuster's conclusions are in favour of the change, and he suggests that it should be effected by a State, which desires to adopt it, changing its own law, and then concluding Conventions with other States which have done the same, perhaps in the form of a model Statute. After describing the historical development, at least as far back as the French Revolution, he submits that the rule is based on a view of the position of wives which is rapidly disappearing in all civilized countries, and in view of the changes made by recent legislation in different countries, notably the United States Cable Act of 1922, the legal and sentimental objections to a change which will give the woman the right to retain her former nationality on her marriage have no solid foundations, and his reasons for favouring the change are in substance that no adult persons shall automatically have to submit to a change of nationality; it is not an obvious consequence of marriage that husband and wife should have the same nationality; that legal change of nationality should coincide with a change of feeling which is not present if the change is effected automatically, and without its being specially brought to the notice of the person concerned, and therefore women

marrying foreign husbands should have to prove their desire to take their husbands' nationality.

As compared with this, the draft Convention lays down as substantial principles that (1) a woman's marriage shall not change her nationality, nor shall a change of her husband's nationality during marriage: (2) her own right to change or retain her nationality shall not be affected by her marriage: (3) her nationality shall not be changed without her consent except under conditions that would cause a change in a man's nationality without his consent: and it then applies these principles to (*a*) retention, (*b*) loss, (*c*) acquisition and re-acquisition (future and retrospective) of nationality of married women, and (*d*) protection for the State-less woman, *i.e.* the woman who loses her former nationality by its law, and does not acquire her husband's nationality by his law—by being given a passport and protection by her husband's State: and lastly in the case of States where the rights and duties of spouses in personal relations and as regards their property depend on nationality, it provides that they shall depend on either the husband's or the wife's nationality at marriage, as they shall then agree. The Convention was explained to the Conference by Miss C. Macmillan and the proposal of Dr. Schuster was adopted, but time was not allowed for the discussion of the question on its merits.

Only a few of the considerations to be taken into account in this question, which is a highly complex one, can here be noticed in connexion with the foregoing suggestions. In the first place, historically the idea of the changeability of nationality has only taken definite shape in the last century, the old rule being *Nemo potest exuere patriam*, and the same period can, speaking generally, be assigned to the evolution of the legal conception that aliens are to be on the same footing as subjects except as regards political rights. Secondly, the largely preponderant view of the laws of civilized countries is that the wife follows the husband's nationality, but the term "nationality" does not have the same connotation in all countries and especially in new countries where there is a large immigrant resident population the status of full nationality is often not sought or desired, in contrast with older countries which provide emigrants to the newer ones. Thirdly, there is a great difference from the point of view of any State between admitting to citizenship a foreign woman who marries one of its citizens and losing as a citizen a woman subject who marries a foreigner; in the former case it gains, in the latter, it loses a subject; and the possibility of a difference of nationality between husband and wife is recognized in many systems.

In Belgium and France under very recent legislation a woman marrying a subject follows his condition; but a Belgian or French woman marrying a foreigner is allowed to choose whether she will take her husband's nationality or retain her own. In Germany, as also in Belgium, a husband can get naturalized or denaturalized without his wife. In our own law, by the common law, and an Act of 1844, a British woman

subject marrying an alien did not thereby lose her nationality, but a foreign woman marrying a British subject was deemed to acquire British nationality; it was not till 1870 that a wife was deemed to be a subject of the State of which her husband was for the time being a subject; and not till 1914 was this clear antithesis stated, that the wife of a British subject is deemed to be a British subject, and the wife of an alien to be an alien, but with the proviso that if the husband ceases during the marriage to be a British subject the wife may retain her British nationality by declaration to that effect; and while the cessation of a marriage by death of the husband or dissolution of it does not revive the former status of the wife, yet the wife, if she was a British subject before her marriage, can obtain naturalization without fulfilling the ordinary requirements of five years' residence. In the United States the common law was in force till 1856, when by Statute the wife of an American citizen, who might herself be lawfully naturalized, was deemed to be an American citizen; and by Act of 1907 an American woman marrying an alien lost her American nationality. The Cable Act of 1922 now severs nationality from marriage altogether: a woman marrying an American citizen does not thereby become an American citizen, but if eligible she may be naturalized upon the ordinary conditions except that no declaration of intention to reside in the United States is required and one year's continuous residence there is substituted for the ordinary period of five years; an American woman does not cease to be an American citizen by reason of her marriage unless she formally renounces it before a competent Court, except that if she marries an ineligible alien she ceases to be an American citizen; if at the termination of the marital status she is an American citizen she retains that status irrespective of her residence; if during such status she resides continuously for two years in a foreign State of which her husband is a subject or for five years continuously outside the United States she becomes liable to expatriation; and retrospectively, a woman who has lost her American citizenship before the Act by marriage to an eligible alien can be naturalized during the marital status.

In our own country an attempt has been made to follow the lead of the United States; and a Bill introduced by Sir John Butcher, K.C., M.P., has been considered by a joint Committee of both Houses of Parliament, which, after hearing the views of representative lawyers, failed to come to an agreement upon it. In substance it provided that a British woman should not lose her British nationality by marriage with an alien, unless she makes a declaration of alienage, and that an alien woman on marriage to a British subject shall be deemed to be an alien; and retrospectively, that a woman who had by marriage to a British subject been deemed to be a British subject still continues to be one unless she makes a declaration of alienage; notwithstanding marriage a woman may apply for naturalization under the same conditions as a man; a woman who is a British subject shall, notwithstanding marriage, cease to be a British subject under the same conditions as a man, and naturalization

by marriage under the law of a foreign State shall not be deemed to be a formal voluntary naturalization, by which British nationality is lost. At the present time, therefore, there is a divergence between the different systems which means that there is a risk of the same person having two nationalities or no nationality; and our law in particular takes away British nationality from a woman subject if she marries a foreigner without ensuring that she first acquires her husband's nationality. Again there are practical considerations that to admit different nationalities for husband and wife endangers the unity of the family in law; that each has to look to different States for protection, and that a wife who has lost her original nationality and has not acquired her husband's nationality has no State to look to for this (this difficulty now arises under the United States Act for British women who have married American husbands here and wish to go with them to the United States); and that the disposition and devolution of each spouse's property may be subject to the laws of different nationalities. Against this it may be urged that family unity does not depend on technicalities, and the parties' feelings of patriotism are not affected by marriage; and that if equal legal capacity for men and women is admitted in municipal law, it should equally hold good in their choice of their international position.

From what has been said above it is evident that the subject is a thorny one and requires most careful consideration, and it is no easy matter to frame a scheme which will satisfy present-day opinion and at the same time obviate the conflict of laws. The *capitis diminutio* of the wife and the feeling that this should be removed cannot be considered apart from the social effect of the whole question; and the Private International Law bearings upon it cannot be ignored.

NOTES.

In Memoriam. Dr. Estanislao S. Zeballos.—The death of Dr. E. S. Zeballos of Buenos Aires, which took place at Liverpool on October 4 with tragic suddenness when on his way to preside at the Conference of the International Law Association in London, removes from among us a prominent International jurist, and an outstanding figure in the public life of his own State, Argentina, and indeed of the South American Continent. He came of a family long settled in Rosario, but from early in life he was associated with the study and practice of law in Buenos Aires. At home his career was one of unceasing activity in many walks of life: Professor of Law at Buenos Aires University for 30 years; Minister of Foreign Affairs three times; Minister of Justice, and of Public Instruction; Postmaster-General; Diplomatic Envoy to the United States; Member of the Provincial Legislature of Buenos Aires, and member of the Chamber of Deputies of the Republic three times, during a period of 12 years and its President three times; and President of the Hypothecary Bank. His position as an international jurist is shown by his membership of The Hague Arbitration Tribunal and of the Institute of International Law, and his Presidency of the International Law Association, which included the meeting of that body at Buenos Aires in 1922, the first International Congress of jurists held in South America. Not only in his own country, but in all the States of that continent he had an established reputation and exercised a great influence on the course of its international policy. He had travelled widely, and visited most European countries, and had studied deeply the whole science of Public and Private International Law. His legal erudition was remarkable: he was a voluminous writer, not only contributing largely to the leading newspaper in Argentina—of which at one time he was editor in chief—*La Prensa*, but publishing substantial legal works, notably one in four volumes on Nationality and Naturalization, which has been described as a mine of information on the subject. He was still engaged on a History of the Paraguayan War in eleven volumes, and a general History of South America. Throughout the Great War, as a convinced pacifist and advocate of peaceful adjustment of international disputes, he stood out for Argentina remaining neutral and thereby placed himself in opposition to many persons who urged that the country should enter the war. His death was hastened by his devotion to the studies which had been the absorbing

interest of his life. Leaving Buenos Aires in feeble health, he had engaged in an exhausting tour of public speaking in the United States, delivering a course of lectures at the Institute of Politics, Williamstown, Massachusetts, on Pan-American International policy and the Monroe Doctrine, and also attending meetings of the American Bar Association at Minneapolis (in which the Hon. Charles Hughes, American Secretary of State, and the Earl of Birkenhead took part), and of the Canadian Bar Association of Montreal. On the voyage to England, though in a condition which had become critical, he continued to prepare his address for the meeting of the International Law Association, which was to be followed by a banquet in his honour at Gray's Inn. The news of his death came as a shock to his colleagues then in session and brought the meeting to a sudden close.

His loss will be especially felt by the Association. He had organized in Argentina and the other South American States branches of the main body, and thus prepared a solid support for the Buenos Aires Conference. The meeting owed its conception and successful result, first and foremost, to his untiring efforts, which secured for it official recognition and financial support from the Argentine Government, and also a representative attendance from all the South American States, to meet the foreign delegates from Europe and the United States. He presided over the deliberations with unfailing attention, and spared no pains to attract public interest to the discussions. His inaugural address contained an illuminating exposition of the Argentine Constitution, which he described as creating a new type of State, one in which all the "inhabitants" can enjoy equal legal rights, without any obligation to accept its nationality, following an international policy of peace and neutrality, and possessing a liberal Civil Code, and a progressive system of Private International Law. He himself contributed papers to the programme dealing with various questions of interest; and his guidance of the meeting through a wide range of subjects was remarkable for its vigour and ability. As an earnest international jurist and publicist, who was interested in every movement that might help on international goodwill and understanding, he will leave a mark on the minds not only of his own time but of the future. All who knew him or knew of his continuous work for high ideals of law will tender their respectful sympathy to his son, Dr. E. M. Zeballos, and his niece, Miss L. S. Zeballos, who were accompanying him on his visit here and are the sole survivors of his family, and join with his countrymen in mourning their common loss. *Requiescat in pace.* G. G. P.

The Late Charles Thaddeus Terry.—The death of Charles Thaddeus Terry, Dwight Professor of Law in Columbia University, New York, means the passing of a great teacher of law, a master in the art of training young men for their entry into the legal profession. Born in 1867 at Albany, New York, Terry received his early education in the schools of that city and at Williams College, from which he graduated with high distinction

in 1889. After a year's travel and study in Europe, he entered the Law School of Columbia University, graduating in 1893. In this same year he became a member of the Bar, and, thereafter, remained in the active and continuous practice of his profession until he died at his home in New York City on February 29, 1923. In the same year in which he began to practise he began also to teach law in the Columbia Law School, giving there the course on Contracts for nearly thirty years. On the retirement of Professor Burdick in 1916, Professor Terry was appointed to the Dwight professorship in law, a distinguished post which he adorned until his own retirement from the work of teaching in June 1922. In the midst of his busy life as practitioner and teacher he yet found time to write articles for legal periodicals and to take an active part in the work of the American Bar Association. One of his special interests was the unification of the laws of the forty-eight States of the Union. From 1904 onwards until his death he was chairman of the New York State Commission on Uniform State Laws. From 1913 to 1915 he was the president of the National Conference of Commissioners on Uniform State Laws.

Much might be written of Terry's work within the three spheres of activity in which he won distinction—the practice of law, legal reform, and legal education. For the moment special attention may be drawn to his work as a legal teacher. His own masters during his student days in Columbia Law School were Dwight and Keener, two of the most brilliant and successful teachers in the annals of American legal education. In many ways Terry carried on the great traditions of his masters. But, owing to his unusual personality, vitality of spirit, vigorous intellect, and remarkable skill in the art of teaching, Terry won for himself his own special place in the hearts of his students and in the history of legal education. He had a profound belief that in education the vital thing is mental training—the development of the capacity, under trained teaching, of using the mind in the solution of life's problems. By the time Terry began his work as a law teacher in 1893 the method first employed by Dean Langdell at the Harvard Law School had already greatly influenced the methods of teaching and studying law in many American law schools. The essential feature of this "case-method" is the discussion with students of legal problems—embodied in decided and hypothetical cases—on Socratic lines. This method was congenial to Terry. He adopted it in his own class-room from the first, and down to his retirement continued to teach in accordance with it. He always insisted on a thorough analysis of the problem involved in the case, on exact and logical reasoning, and on accurate and precise expression of those mental processes and their results. Endowed with the finest gifts of the teacher, Terry spread his influence far and wide throughout the ranks of the American legal profession. His life was devoted to justice. His true memorial is the greater justice that is flowing—and will continue to flow—as the result of his personality and work.

From the true and sympathetic appreciation of Terry by his friend and colleague, Dean Stone of the Columbia Law School, in the May number of the *Columbia Law Review*, I take these sentences:

"[To] do the work of the teacher with devotion and skill became the dominating purpose and one of the durable satisfactions of his life. . . . Tireless energy, a keen intellect, devotion to duty and to all those forces and interests which work for public and private good, were characteristic of the man. He met adversity bravely, he fought hard, but always with a smile on his face, and he never admitted the possibility of defeat. His intimates knew him as a loyal, trusted and genial friend."

H. D. H.

Law as an Education Study.—The work of the late Professor Charles Thaddeus Terry as a legal teacher, reviewed briefly in the preceding note, was itself the application, on his own part, of certain general principles of education to which he held firmly. The essence of Terry's view of education he embodied in 1909 in an article—"Law as an Education Study"—which has now been reprinted in the May number of the *Columbia Law Review*. The lesson which Terry teaches in this article is important.

"Education does not consist merely in the acquisition of knowledge," Terry declares. "Its purpose is not culture. . . . Its purpose is not polish. . . . [Education] is not a process for the dissipation of the mental faculties over a vast array of subjects. . . . The idea that educational institutions largely consist in books has long since become obsolete. . . . It is the trained, disciplined minds of instructors, leading and guiding from day to day through the various processes of thought those who attend for instruction, that make a genuine educational institution. . . . [We] have too often regarded the mind as a stomach to be overloaded with all sorts of things, digestible and indigestible. . . . [But the mind] is rather like a set of muscles, to be strengthened and made flexible . . . until its use becomes perfectly natural. . . . [The] purpose of education is to give a mental discipline, an intellectual training, or, in a word, to teach the student to think. If he does not acquire this power, he never is educated; if he once does acquire it, he never will lose it."

Terry views legal education as an application of these general principles. "No man can 'know the law,'" he declares in one place, "but he can have worked over principles and have worked out principles, and have trained his mind upon them to such an extent that it will work naturally to the solution of the legal problem involved in any new set of facts." In pursuance of this line of thought Terry goes on to say: "Some studies are more conducive to logical thought than others; of these, law is the most conducive. Some studies are better adapted to the training of the reasoning powers than others; of these, law is the best adapted; some studies give more mental discipline than others; law gives more than any other." Very much depends, Terry continues, upon the manner in which law is taught. The teacher must be able to stimulate and inspire

his pupil. The pupil must come to the class-room charged with a desire to learn. The teacher must create the " atmosphere " ; he is the element of prime importance in the educational process. " The instructor and the subject fix the methods of study and control the mental processes of the student in his course."

" To secure the best possible results in a school of law," Terry contends, " the student should come to the school, if possible, with a mind trained . . . to a degree at least. . . . The point is that a thorough mental training is indispensable to a legal education worthy the name. If, fortunately, the student gets some of this training before he enters the law school, so much the better. . . . But get it he must, [and he ought not to receive the approval of the law school until he has] demonstrated beyond a doubt the acquisition by him of that facility in thought, that ability to reason and that grasp of the processes of deduction and induction which, when applied to a system of law, mean legal education. . . . As a means for the cultivation of the mind, no other subject approaches the study of law. Its value in this respect is quite apart from the use to which it may be put in the practice of law. . . . [There] is no study so well adapted to mental training, and, therefore, of such great importance in the way of education as the study of law."

In elaboration of this idea Terry holds that there are two chief reasons why the study of law is superior to any other study. " First, it is a science based upon logic. Its principles are reached by processes in induction and deduction. . . . [The] student cannot master any branch of the subject except he learn to employ for himself that process of reasoning. It is inevitable that, by the time the student has finished his law course, he shall have acquired such facility in the use of his reasoning faculties that he shall employ them easily and without conscious effort." The second reason, says Terry, is that the subject of law " concerns itself with the humanities." The term " humanities," he goes on to explain, is " here used in its true sense. It is justice as between man and man, which is the end and aim of all law."

Terry does not overlook the fact that the law is " constricted somewhat by tradition, limited to an extent by unfortunate decisions of courts, warped by special circumstances unduly affecting its course of development " ; but he holds that, despite these features, " the law presents, on the whole, a comprehensive system of causes and effects, of sequences and consequences, of remedies nicely adjusted to corresponding wrongs." " Where," he asks, " could there be found anywhere else so attractive and so satisfactory a field for the exercise of the mind and the training of the mental faculties ? "

Terry's position in regard to the purpose and method of legal education is worthy of very serious consideration by legal teachers. Too often the student is oppressed and harried by the requirement of his teacher that he accumulate in a short time a whole encyclopædia of legal learning. Is there not a valuable lesson to be gained from Terry's article ? Once the

training of the mind has reached a certain point, the study of legal problems becomes—or ought to become—a pleasure rather than a burden. If, by means of mental training within a limited field of law, students can be made to see, in Coke's words, "the gladsome light of jurisprudence," they will then more readily grasp the principles of other branches of the law; and, when the time comes for them to practise their profession, they will then more easily and surely solve the problems of their clients in the spirit of justice. "It is justice as between man and man, which is the end and aim of all law."

H. D. H.

The Nature of Political Thought.—Attention may be drawn to an essay in the May number of the *Political Science Review* by Mr. Raymond Gettell on "The Nature of Political Thought." The competence of Mr. Gettell has been proved by his well-known books, and the present paper is an admirable summary in a few pages of the different problems that political thinkers have attempted to solve, and of the outlooks of the various schools of political thought. The nature and authority of the State, the ideas of sovereignty, the conception of law, the forms of government, the province of political authorities, and the relations between States, are all discussed briefly, and under each heading the author has something of value to say. Particularly good are the remarks upon the conservative and the critical schools of thought, and the concluding pages upon the value of political theory. The paper ends by pointing out the ever poignant contrast between the mastery that man has obtained over the forces of nature and the small measure of his control over himself.

H. J. R.

The Clause compromisoire.—Mr. Wyndham A. Bewes writes: The difficulties which are met with in many countries in enforcing the usual arbitration clause in British commercial contracts are well known. The chief impediment is the local requirement by which all submissions have to conform to certain rules which only apply when the difference to be solved has already arisen and is awaiting decision. A Bill is at the present time before the French Chambers which is intended to meet the problem and deal with it much as is the case in Great Britain. Meanwhile there has been a decision of the Supreme Court of Chile, where the law does not materially differ from that of other Spanish American countries, nor indeed from that of France, whereby it was held that the clause is as good as any other lawful contract, and must be observed, leaving the submission itself to the procedure required locally for disputes which have already arisen. It must be said that this solution of the difficulty commends itself as correctly interpreting the contract and as indicating the proper method of giving effect to it. The case above referred to is *Gildesmeister Compañía con Vodnizza, Revista de Derecho,* vol. xviii, p. 75.

Open Price Associations.—Mr. Milton Nels Nelson has written a monograph on the "Open Price Associations" (*University of Illinois Studies in the Social Sciences*, vol. x, No. 2; June 1922; 1.75 dollars). It is a useful piece of economic analysis; but it is still more valuable as an indication of the urgency for some solution of the eternal struggle between healthy competition and social regulation. The merchants and manufacturers of the United States have discovered that the fierce fighting of the economic field must inevitably lead to the same fatal results as in a field of physical battle. In the race for trade, the manufacturers are tempted to quote impossible prices, which ruin themselves as well as their competitors. Hence this "open price" movement, which is an agreement between traders to place their cards on the table. That is, they publish to all members of their association their costs of production. On the basis of these figures, it is possible to find an agreed price, which will be reasonable, and will not bring any reasonably efficient manufacturer to disaster.

The cost of production is certainly the chief factor in all lowest prices. To this extent the Open Price Associations are on a sound economic basis.

But it would be too optimistic to think that this method of regulating prices will meet all the difficulties. One of these difficulties has quickly arisen, for the State has begun to prosecute the associations on the ground that they are a violation of the State and Federal anti-trust laws. On this Mr. Nelson comments: "It behoves the Government to come to a full recognition of the fact that it is a mistaken public policy, and also utterly futile, for it to attempt the task of forcing business men to compete in ignorance and secrecy. The open price movement has sprung into existence in response to the growing desire of business men to govern their business operations intelligently in the light of existing business conditions. They have tried to do for themselves what the Government does in a small way for the farmers."

The regulation of prices in a manner that will be alike fair to the enterprise of the trader and to the social group is probably the most difficult problem of political economy. One reason why the mediæval guilds broke into pieces was that there was a tendency for them to become monopolies. Yet they did exist for many centuries; and they still exist in various parts of the world in more primitive forms. It remains, as this monograph by Mr. Nelson is further proof, the urgent need to find some method by which producers and traders can combine for purposes of increased efficiency, and yet be controlled by the social rights of the whole community. It is possible that the solution may be a guild organization with State-controlled prices.

The danger is that this highly technical problem will be discussed too much by theorists, and not enough by practical men of affairs. Mr. Nelson's thesis will help to bring the question into the world of everyday things. We are brought into close contact with business details. He,

for example, gives us minutes of the meetings of Open Price Associations, and what the members said to each other. Thus: "Mr. Cleveland, who had just made a swing around the buying circle, saw that he had found manufacturers well stocked and most of them hampered because of the failure of the Government to effect settlements on contracts. He looked for a heavy demand for No. 2 Gum. Stated he was holding Sap Gum for $37.00 at mill. . . . Mr. Cornelius said he was asking $50.00 for his Ash, but manufacturers were quoting $45.00 to $47.00. Believed there would be a better demand for Red Gum." And so on. Such details are of vital importance when we are seeking a solution of the price problem which will not necessarily be perfect; but which will work in practice, a very different matter. In the United States they have carried modern business methods to a further length than in Great Britain; and they are therefore being more urgently pressed towards finding a protection against unfair competition. Hence the Open Price Associations on one side and the Sherman anti-trust legislation on the other. On neither side has a solution been discovered. The social control of prices remains one of the most urgent economic problems of the day. The method of collectivist or State ownership has become more palpably unsatisfactory since the recent war put so much power into the hands of bureaucrats—with such unsatisfactory results.

Agricultural Economics.—The *International Review of Agricultural Economics* (April–June, 1923; International Institute of Agriculture, Villa Umberto I Rome 10) is one of those useful publications which give a world that is weary of politicians some hope that one day they will be replaced by such useful people as officials who are engaged in promoting agriculture and other useful arts. The League of Nations has already begun to waste its time on subjects of no importance. It is always important to grow potatoes and wheat. This number of the *Review* has a great mass of useful information gathered from all over the world. H. Dade's paper on the Chambers of Agriculture in Germany is a proof of the energy with which that country is reconstructing itself. A long paper by Mr. F. L. Tomlinson deals with the war allotment developments in England and Wales; with a useful historical introduction of the practice since the Plantagenets.

They added 3,000,000 tons of food during the four years of the war; and in area they had added 70,000 acres to our pre-war 130,000 acres of allotments, and that increase by 1920 had fallen to 55,000 acres. A valuable paper by G. Jonescu-Siserti discusses the peasant system of Rumania, with a succinct historical sketch of the origin of serfdom—another proof that the Middle Ages were more democratic than the State centralizations of the seventeenth and eighteenth centuries. There are also papers on Agricultural Co-operation in the United States; and a detailed one on the Land Settlement in the Argentine Republic.

The Constitution of Latvia.[1]—Following the lead of other recently created nations of Europe, Latvia has promulgated a Constitution. This new republic came into the world of nations on November 18, 1918, when it proclaimed its independence, although its Government was not formally recognized by the United States until July 27, 1922. One year previous to this, on September 22, 1921, Latvia became a member of the League of Nations. After the independence of Latvia had been proclaimed, a constituent assembly was convened, and it was this body which drew up the new Constitution. It was adopted February 15, 1922, and became law on June 30.[2] Elections under the new organic law were held October 7 and 8, and the newly elected Parliament met November 7 of the same year.[3]

The Constitution contains eighty-eight articles, grouped into seven sections. It contains only 3,300 words. S. 1, after stating that " Latvia is an independent democratic Republic," and that " the sovereign power of the Latvian State belongs to the people of Latvia," proceeds to give the territorial boundaries of the State and to describe the national flag. S. 2 deals with Parliament, and explains that there shall be a Parliament or Saeima consisting of one hundred representatives of the people. There is to be no second chamber. The Saeima is elected on the basis of proportional representation, and there is universal, direct, secret suffrage for both men and women over twenty-one years of age. Any person of age may be elected to Parliament, and parliamentary elections take place every three years, unless a dissolution has taken place previously. Elections are held on two days, one of which shall be Sunday, and Article 13 requires that " the Saeima shall assemble not later than one month after its election."

S. 3 deals with the President of the State, and provides that he is to be elected by Parliament for a three-year term. He must be over forty years of age and cannot hold office for more than six consecutive years. Provision is made to prevent deadlocks between the President and Parliament by giving the President the right to dissolve Parliament, and by giving Parliament the right to recall the President. If the President is

[1] Reprinted from *The American Political Science Review*, vol. xvii, no. 3, August 1923.

[2] An English translation of the Constitution of Latvia appeared in *Current History*, xvii, 486–9 (Dec., 1922). It is a very free translation and is not without inaccuracies. The following changes, based on an official translation furnished by the Latvian legation, should be noted. The introductory sentence is omitted: " The people of Latvia, through their freely elected Constituent Assembly, have adopted the following Constitution." Also in Article 73 after the words " conclusion of peace " the following words should be inserted: " proclamation and termination of the state of exceptional law." Article 85 should read: " In Latvia shall exist courts of law, with juries, on the basis of a special law." Other minor changes could be mentioned, but they are unimportant. The Constitution in the original can be found in *Collection of Laws and Government Orders*, No. 12, August 7, 1922 (Latvia).

[3] In the *Berlin Vorwärts* of October 24, 1922, the result of the election to the first Lettish Parliament is given.

defeated in the elections following a dissolution, he is considered as having resigned. Article 52 states that "the Speaker of the Saeima shall take the place of the President of State, should the latter be outside Latvian territory, or in any other way prevented from carrying out the duties of his office." Except when he proposes a dissolution or when he invites a person to form a Ministry, the President has no political responsibility.

S. 4 provides for a Cabinet which is responsible to the Saeima for carrying on the government. Interrogations may be put to Cabinet ministers and they are required to answer. Ministers are not required to be members of the Saeima, but have the right to be present at its meetings. Other responsible State officials authorized by a minister also have the right of participating in the sessions of the Saeima and of submitting amendments to Bills.

S. 5 provides a system of initiative and referendum for all national laws excepting matters concerning the budget, treaties, mobilizations, taxes, loans and customs dues, military service, and the declaration of war, commencement of hostilities, and the conclusion of peace. The people have the right to propose and vote on constitutional amendments if they so desire, but ordinary amendments are made by a two-thirds vote of the Saeima without reference to the people. Ss. 6 and 7 deal with courts of justice and State control. No mention is made of racial or religious guarantees,[1] and no system of local government is set up.

James K. Pollock, Jr.

Harvard University.

Place of Hindu Law in Comparative Jurisprudence.—Mr. S. G. Vesey Fitzgerald contributes to the July number of the *Law Quarterly Review* an interesting article on the place of Hindu Law in Comparative Jurisprudence. It consists chiefly of a comparison between the growth and development of the Roman and Hindu systems of law. The most arresting of these comparisons is that between the Roman and Hindu marriage laws, in the course of which the author points out with clearness and force the original resemblances, and traces concisely, with an evident mastery of his subject, the manner in which they gradually diverged until the religious and sacramental idea of marriage disappeared in Rome, whereas in India it is now the dominant one.

Mr. Fitzgerald rightly devotes much space to the importance attached to "The family" both in the law, and in the sentiment, by which the Hindu is governed. He quotes a striking instance of this in the case of Mr. Justice Chaudri, who supported some 70 or 80 poor relations. A still more impressive illustration of the strength of this sentiment was manifested some years ago when a passenger steamer plying on the western coast was lost in a storm with some 600 Indian passengers on board—

[1] In Latvia there is very little reason why racial or religious difficulties should arise, since the large majority of the population are Letts and belong to the Lutheran Church.

nearly all of whom were men, the bread-winners of their families. A large sum was raised for the relief of those left " destitute." When, however, the Relief Committee set to work it was found that every woman and child had been taken charge of by relatives. In fact there were no destitute to be relieved.

It may perhaps be old-fashioned to say so, but it does seem that Mr. Fitzgerald has very much under-emphasized the important part played by " custom " both in respect of the inclusion in the Shastras of the customs as they then prevailed, and in the modifications of these customs which the later commentators felt bound to recognize, while endeavouring to the best of their ability to reconcile them with the sacred texts on which they were commenting. Doubtless both the sages and their commentators did what is not unknown even in recent times to be done by officers deputed to record village customs ; that is, they recorded in certain cases not what was, but what they thought ought to be, the rule of law.

Mr. Fitzgerald questions the accuracy of Dr. Jolly's statement that " The separation of moral precepts from laws is everywhere, and especially among such a religious nation as the Hindus, the work of a comparatively late period." Space will not allow of an entrance into this controversy, but this at least may be said, that Narada or Yajnavalkya would have opened their eyes very widely had they been confronted with the distinctions between " moral precepts " and " laws," which the Privy Council have long been in the habit of enunciating.

French Study of English Law.—Students of comparative law should be grateful to Mlle Thérèse Lion for her lucid endeavour to expound in the *Journal du Droit International* [1] the conception of a trust in English law—a conception, as she herself explains, wholly foreign to French law. In the course of her short study she shows how French law, while rejecting the legal ownership of the trustee, is enabled to give effect to beneficial interests by regarding the trustee as the mandatory of the beneficial owner. The conception of a mandate is in its turn foreign to English law, for it differs considerably from agency. The subject is important, because questions of doubt and difficulty arise in practice on account of this conflict of ideas. In the monthly *Bulletin* of La Société de Législation Comparée [2] she has, with the able assistance of Mr. Edward Jenks, accomplished an even harder task. Mr. Jenks prepared a most comprehensible memorandum on the new Law of Property Act, and this Mlle Lion has annotated for the benefit of French readers. Thus they are spared the bewilderment of those Englishmen who first set eyes on the one hundred and ninety-one sections and sixteen schedules of the Act. Perhaps there is no one at the present time who is doing more in the realm of law to interpret English law to French students and *vice versa* than Mademoiselle Lion, who holds the post of assistant to Professor Levy Ullmann in the University of Paris. Mlle Lion is an *avocat* of the

[1] 1923, p. 677.

[2] April–June 1923, p. 167.

Paris Bar and before women were admitted to the Inns of Court was permitted special facilities to study English law in the Middle Temple.

Edward Fry Memorial Library.—The Trustees of the Edward Fry Library of International Law are to be congratulated upon the issue of a *Catalogue* showing the contents of the Library, together with other works on the subject contained in the Library of the London School of Economics, where the collection is at present housed. The printing of the *Catalogue*, as stated in the preface, has been made possible by the Carnegie United Kingdom Trust which promised an amount up to £500 to cover the cost.

The late Sir Edward Fry, during his lifetime, attempted to establish a library of international law in London, but without success. His widow and children, therefore, in 1920, handed over to trustees the sum of £3,000 for the creation of such a library as the best form of memorial to him, and a start was made by the purchase of the excellent collection of books on international law, comprising about 1,200 volumes, made by the late Professor Oppenheim. The *Catalogue* of this collection is divided into two parts ; the first contains complete entries arranged according to a classification schedule which is printed at the beginning of the volume, and the second part consists of an alphabetical index to authors and subjects, and a selection of the titles. Considerable difference of opinion exists as to the respective merits of the " Alphabetical " and the " Classified " catalogue, but it may be suggested that, in the case of a comparatively small and highly specialized collection, such as this, an alphabetical catalogue, containing full entries under authors 'names, followed by an index of subjects with necessary cross-references (after the style, for instance, of the *Catalogue of the Library of the Middle Temple*, published in 1914) would have afforded easier reference to the contents of the Library. It is a little difficult, also, to appreciate the necessity for indexing some of the books under their titles in the second part of the *Catalogue*. Anonymous books and periodicals one would expect to find included in this way, but the *Aftermath of the War*, by Beak, under " Aftermath," *A Chapter of National Dishonour*, by Chamberlain, under " Chapter," *Hammering out the Details*, by Keen, under " Hammering," and several others, all of which are duly noted under the author's name in the alphabetical section, as well as occupying their place in the classified section, seems rather like needless repetition. These, however, are merely questions of detail. The *Catalogue* is, as a whole, an accurate and useful piece of work, and the bibliographical information supplied will undoubtedly be of great assistance to students of international law. The hope may be expressed that the efforts of the Trustees and the officials concerned in carrying on the work of the Library will be the means of stimulating the study of a subject to which too little attention is given in England.

H. A. C. S.

Maintenance Orders.—It is officially announced that Orders in Council have been issued extending the Maintenance Orders (Facilities for Enforcement) Act, 1920, to the Oversea Territories named below. The Act provides for the enforcement in England and Ireland of maintenance orders made by a Court in any part of His Majesty's Dominions outside the United Kingdom or in any British Protectorate to which it extends, and the Legislatures of the undermentioned Territories, to which it has now been extended, have made reciprocal provisions for the enforcement therein of maintenance orders made by Courts in England and Ireland: South Australia, the Northern Territory of Australia, Barbados, British Guiana, the Colony and Protectorate of Kenya, the Colony and Protectorate of Sierra Leone.

The operation of the above-mentioned Orders in Council is confined to England and Northern Ireland, and similar provision has not yet been made as regards the Irish Free State by the Government of that State.

Administration of Justice.—It is officially announced that, in view of the provisions of Part II of the Administration of Justice Act, 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any part of His Majesty's dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends, the Legislatures of the undermentioned Oversea Territories have made reciprocal provision for the enforcement therein of judgments obtained in the High Court in England, the Court of Session in Scotland and the High Court in Ireland.

Orders in Council have accordingly been issued extending Part II of the Act to New Zealand, Newfoundland, the Falkland Islands, Fiji, the Colony of the Gambia, the Colony and Protectorate of Kenya, Southern Rhodesia.

The operation of the abovementioned Orders in Council is confined to England, Scotland and Northern Ireland, and similar provision has not yet been made as regards the Irish Free State by the Government of that State.

NOTICES OF BOOKS.

SIR FREDERICK POLLOCK'S "ESSAYS IN THE LAW."[1]

An historian of ideas and institutions, a philosopher, an acknowledged master of the common law and one of its most felicitous expositors, the draftsman of a successful example of English codification, a professor of law, an editor of the first rank, and a writer of essays as full of charm as of learning, Sir Frederick Pollock occupies a recognized position in the worlds of law and letters.

His books are known and appreciated wherever the spirit of the common law prevails. Pollock on Contracts and on Torts are read by every serious law student, and maintain their positions among a host of friendly rivals. The *Digest of the Law of Partnership* found its way to the statute book as the Partnership Act, 1890, and the quality of its workmanship is attested by the small number of decisions that have been necessary for its interpretation ; and that in a department of law in which disputes are frequent and acute. The little book on Possession, written in conjunction with the late Mr. Justice Wright, proved that the common law had evolved, almost without knowing it, a theory of possession as complete and logical as the Roman, and certainly no whit less practical. Upon the History of English Law during the flowering time of the Middle Ages *Pollock and Maitland* is the acknowledged classic.

It is almost without precedent to find one man who is master of the practical, the historical, and the theoretical aspects of the subject, but the *First Book of Jurisprudence* completes the trilogy ; and the *Leading Cases done into English* proves that the art of making legal light verses can be practised as successfully south of the Tweed as north of it. The American lectures on "The Genius of the Common Law" and "The Expansion of the Common Law" and the Introduction and Notes to Maine's *Ancient Law* must be dismissed with a mere reference ; but they are fascinating and suggestive examples of historical insight and of a full weight of learning lightly borne.

[1] *Essays in the Law.* By the Right Hon. Sir Frederick Pollock, Bart., LL.D., D.C.L., K.C. 8vo, pp. xii and 303. 1922. (London: Macmillan & Co., Ltd. 12*s.* 6*d.* net.)

Passing from the strictly legal atmosphere, the *History of the Science of Politics*—founded on a series of lectures delivered at the Royal Institution—is a book that every student is recommended to read, but it is a well-laid snare for the superficial. It is easy to read ; but the deeper one's knowledge of the subject becomes the more one realizes the quantity of tightly packed thought that it contains. Again, upon the quite recent subject of the League of Nations, people are coming to the conclusion that, among the host of expositions of all qualities, Sir Frederick Pollock's knowledge of legal antecedents and political principles makes his work the most satisfactory that has yet appeared.

In the realm of philosophy the *Spinoza* has helped more perhaps than any other English book to restore to his rightful place as one of the first of European philosophers and publicists the spurned and neglected Jew of Amsterdam.

Finally we come to the collected essays, and the volume before us is if anything superior in interest to its two predecessors, the *Jurisprudence and Ethics*, published in 1882, and the *Oxford Lectures*, published in 1890. Most of these essays are well known, but they were widely scattered, and the thanks of the commonwealth of letters are due to the "certain learned friends" who have persuaded Sir Frederick to collect them into one volume. To the readers of this *Journal* it will probably be sufficient to recall the titles. The farewell Oxford lecture on the "History of Comparative Jurisprudence" has lost nothing in point and freshness in the twenty years that have elapsed since it was delivered. The history of the Law of Nature has, in conjunction with Bryce's well-known papers, revolutionized ideas on the subject ; or, rather, has restored to modern thinkers the old English idea of the Law of Nature as the Law of Reason which had been submerged since the time of Hooker. The lecture on the Law of Reason in the volume entitled, *The Expansion of the Common Law*, and the *Notes on "Maine's Ancient Law"* should be read in conjunction with it. The discourse to the British Academy on Locke's Theory of the State is the best exposition of Locke's political theory, which has been so strangely neglected since the end of the eighteenth century. "Government by Committees in England" is another revolutionary paper—and none the less so because it first emphasized the historical and political importance of things that are familiar to everyone. But lest this list should become a mere table of contents we will mention merely the important essays on the Fiction Theory of the Corporation in the Common Law, on Archaism in Modern Law, on English Law Reporting, on Lay Fallacies in the Law, and the final paper on the marvellous indiscretions of Mr. Sergeant Arabin. No such collection of legal and political essays has been published in this country since the appearance of Bryce's *Studies in History and Jurisprudence.*

H. J. R.

PRIZE DECISIONS OF THE UNITED STATES SUPREME COURT.[1]

The division of International Law of the Carnegie Endowment for International Peace has, under the direction of Dr. James Brown Scott, been responsible lately for the publication of many scholarly editions of International Classics. Its latest contribution to International Law, and one which is bound to prove of permanent value, is the collection of the Prize decisions of the United States which up to now had been scattered among more than half a dozen reporters (Cranch, Wallace, Wheaton, Dallas, Howard, Black and Peters) or among the bulky 250-odd volumes of the United States Reports.

Unlike the decisions of the British Appeal Courts in Prize which in their earlier period and up to the Crimean War have been handed down to us, not in the form of reasoned judgments, but, in the great majority of cases, simply as mere records of the results of the hearing, the United States have been fortunate enough to possess the complete decisions of their Appellate Tribunal since its first formation.

The United States Supreme Court was constituted by the Judiciary Act of 1789, and has at all times since this date been the final Court of resort in prize causes from all the forty-eight States now composing the Union. In each of these States there exists, in fact, a federal Court which, if a case properly arise, may exercise prize jurisdiction without the necessity of its being expressly constituted as a Prize Court at the beginning of the war.[2]

The influence of the United States Supreme Court in moulding and developing international law has been great. As regards prize matters, it shares with the British Prize Courts the distinction of being a Tribunal administered on strictly judicial lines, entirely unfettered by executive orders and acts, and applying international law as independently as it is possible for a municipal Court to do so. The great principles laid down by Lord Stowell in 1798 and 1799 that the decisions of the English Prize Court were " unconnected with any present purpose of particular national interest," " uninfluenced by any preference or distinction to independent States," and " delivered from a seat of judicial authority locally here indeed, but according to a law which has no locality " have been constantly followed and upheld by the American Supreme Court. Thus in *The Paquete Habana* and *The Lola* [3] Mr. Justice Gray decided that international law is part of the United States law and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. And Mr. Justice Johnson held in

[1] *Prize Cases decided in the United States Supreme Court*, 1789–1918. Edited by James Brown Scott. 3 vols. (Oxford: Clarendon Press, 1923.)

[2] *The Sloop Betsey*, [1794] vol. i, p. 9 ; 3 Dallas 6.

[3] [1900] vol. iii, p. 1920 ; 175 U.S. Rep. 677.

The Amiable Isabella [1] that " considerations of policy, or the views of the administration, are wholly out of the question in this Court."

The Prize Courts of both nations were equally anxious, as far as it lay in their power, to protect neutral, and, at times, even belligerent interests. In his celebrated judgment in *The Charming Betsy*,[2] Chief Justice Marshall held that an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. Mr. Justice Peckham decided in *The Buena Ventura* [3] that " the President's Proclamations should receive the most liberal and extensive interpretation of which they were capable, and, when two or more interpretations were possible, the one most favourable to the belligerent in favour of whom the Proclamation was issued."

It is therefore not surprising to find that the rules and practice of the British Prize Courts, so far as cases have arisen to which they could apply, have been recognized and enforced by the Supreme Court of the United States.[4] And this is so not only because the United States had, at one time, formed a component part of the British Empire and our prize law was their prize law,[5] but equally because the rules established in the British Prize Courts have always appealed to the American judicial mind as being substantially just and equitable and as embodying the accepted principles of the law of nations.

There are two important points, however, in which the United States have either departed from Lord Stowell's decisions or else have given to those decisions an extension which that great judge had never foreseen.

The first relates to the carriage of neutral goods on armed enemy merchant ships. In *The Fanny*,[6] Lord Stowell decided that a neutral who puts his goods on board such a ship betrays an intention to resist visitation and search, and, so far as he does that, he withdraws himself from the protection of neutrality and assumes a hostile character. The views upheld by the American Supreme Court were diametrically opposed. In *The Nereide* [7] and *The Atalanta* [8] that Court laid down that a neutral cargo found on board an armed enemy's vessel is not liable to condemnation as prize of war, and denied that a neutral, by placing his goods in the armed vessel of an enemy, connects himself with the enemy in such a way as to be impressed by the enemy character. It is interesting to note that Judge Story, who dissented in *The Nereide* from the majority decision and

[1] [1821] vol. ii, p. 1101 ; 6 Wheat. 1.
[2] [1804] vol. i, p. 201 ; 2 Cranch 64.
[3] [1899] vol. iii, p. 1911 ; 175 U.S. 384.
[4] Story, *Notes on the Principles and Practice of Prize Courts*, [1854] p. 13.
[5] *Thirty Hogsheads of Sugar* [1815], vol. ii, p. 696 ; 9 Cranch 191.
[6] [1814] 1 Dod. 443.
[7] [1815] vol. ii, p. 753 ; 9 Cranch 388.
[8] [1818] vol. ii, p. 999 ; 3 Wheat. 409.

adhered to Lord Stowell's opinion, appears to have been converted to the American doctrine three years later, as he did not express a dissenting opinion in *The Atalanta*.

The second point relates to the theory of continuous voyage as applied to contraband and blockade. Although Stowell was the first to coin the phrase of the " continuity of voyage," he never extended it beyond enemy colonial trade or what is commonly called " the rule of the war of 1756," under which neutrals were not allowed to engage in time of hostilities in a trade from which they were excluded in time of peace.[1] During the Civil War the American Prize Courts took up this doctrine and stretched it so as to sustain the seizure of a vessel between the port of original departure and the intermediate neutral port in both cases of contraband and blockade. The Supreme Court held thus that a voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose (*The Bermuda*).[2] In *The Peterhoff*[3] the rule was extended still further by applying the doctrine to the carriage of goods from one neutral port to another in all cases where there was a contemplation of an ulterior transportation by land to the belligerent.

In spite of the violent protests of the great majority of international publicists,[4] the doctrine of continuous voyage was made part and substance of all Prize Courts during the Great War. In fact, the development of all means of transportation by land and sea have rendered its adoption essential, as otherwise the belligerent right of capture would be nugatory if a consignment to a neutral port were sufficient to protect the carriage of contraband.

The same may be said as to the American view of defensively armed merchant vessels which represented the existing law as applied by the Allies in the World War and which appears to have prevailed.[5] The right to arm their merchant vessels for purposes of defence was asserted by both Great Britain and France, and such arming did not assimilate these vessels to men-of-war and could not have the effect of impressing a hostile character on the neutral goods found on board.

What might have been the revised opinions of the Supreme Court of the United States as regards the new methods of naval warfare is a matter which is left in conjecture, as no prize decisions have been rendered by the American Prize Courts during the Great War. The inclusion of *The Appam*[6] among the prize judgments of the Supreme Court is highly

[1] *The Maria*, [1805] 5. Ch Rob. 365.
[2] [1865] vol. iii, p. 1555; 3 Wall. 515.
[3] [1866] *ib.*, p. 1629; 5 Wall. 28.
[4] *Revue de Droit international*, vol. xiv, p. 329.
[5] A. Pearce Higgins, *Defensively Armed Merchant Ships*, 1917.
[6] [1917] vol. iii, p. 2077.

contestable, as the United States had not yet declared war on Germany and were therefore not belligerents at the time of its decision.[1]

C. J. COLOMBOS.

THE CONSTITUTION OF CANADA.[2]

PROFESSOR KENNEDY'S treatise on the constitution of Canada approaches the subject from the point of view of historical development, seeking not to describe or analyse the Constitution, but to trace the various movements out of which the present polity of the Dominion has sprung. The author is specially qualified for the task, both as an historian and as one who studied in detail with the late Professor A. H. F. Lefroy the constitutional decisions whose effect is set forth in the latter's invaluable *Short Treatise on Canadian Constitutional Law*. Moreover, he has envisaged the history of the Canadian Constitution from a novel point of view; the creation of a true unity within diversity, which is in process of being accomplished, is regarded as a challenge to the absolute Austinian theory of sovereignty, and as pointing the way to the reorganization of the British Empire on lines for which there has hitherto been no parallel. Viewed in this light the familiar outlines of Canadian constitutional history acquire fresh interest and value, and even the struggles of the periods immediately preceding and following Lord Durham's mission become better worth investigation. The perplexities of both Lord John Russell and Lord Sydenham as to the possibility of permitting responsible government to a dependency may be more readily understood and excused when we remember our own difficulties as to the combination of the complete autonomy of the Dominions with effective membership of the British Empire. The creation of new political categories is a task whose difficulty is apt to be little appreciated by those who have grown up in a society which has accepted them. But it is well to recognize as clearly as does Professor Kennedy in his concluding chapter that the many anomalies of the Imperial tie will much more effectively be solved by the development of a wider conception of the Empire than by the demand for independence which is supported in Canada by the assertion that there is no real possibility of combining Dominion autonomy with Imperial unity. To the abstract argument the simple answer is that each difficulty as it arises has in the past attained effective solution, nor is it clear that the period need ever arrive when constructive ability will be baffled.

Controversial as is the ground covered by Professor Kennedy, little opportunity is offered for decided disagreement. Sir Charles Metcalfe perhaps receives something less than the sympathy due, and his tenure

[1] The state of war between the United States and Germany was declared on April 6, 1917. The *Appam* decision was delivered by the Supreme Court one month previously.

[2] *The Constitution of Canada: An Introduction to its Development and Law.* By W. P. M. Kennedy, Litt.D. (Humphrey Milford. 1922).

of office had the great merit that it proved once and for all that the theory of government which he was bidden to work was impossible of operation, and paved the way for Lord Elgin's complete acceptance of ministerial responsibility. It is technically true that no instance of dismissal exists in the federal Government of Canada (p. 382), but, apart from the designs of Lord Dufferin when Sir J. Macdonald's ministry was tottering to its fall over the Pacific scandals, it must be remembered that Lord Aberdeen practically forced Sir C. Tupper to resign office by refusing to act on his advice in various matters after his defeat at the polls was certain in 1896. On the vexed question of the right of a province to institute the referendum the matter has lately been complicated by expressions of the Judicial Committee, which seem to concede the right,[1] but a definite pronouncement on the issue has yet to be awaited. The interesting argument (pp. 416 ff.) in favour of the recognition as obsolete of the Dominion right of disallowance of provincial Acts as confiscatory might be strengthened by the realization that the Imperial Government has now in effect pronounced its decision not to disallow State Acts in Australia on such a ground.

A. BERRIEDALE KEITH.

TOWARDS INTERNATIONAL JUSTICE.[2]

THIS volume contains ten papers and addresses of the author on divers aspects of the League of Nations. Of these three were written during the war, the earliest in February 1915. The English League of Nations Society was not formed till May, and the American League not till June of that year: it will thus be seen that Mr. Keen was among the first pioneers who put into some form ideas that were vague in many minds. The papers written after and in criticism of the Covenant have more practical importance now, but Mr. Keen is fully justified in republishing previous opinions, for the most part found to be confirmed by the Treaty itself. Some indeed, formed in the heat and stress of the war, had to be modified, as for instance the view that military force was to be preferred to outlawry as the League's weapon. He is right in regarding the League as an experimental institution, which has to approve itself by its just dealing, and by its success in the avoidance of war; also in claiming that the Treaty itself must from time to time be subjected to revision, according to the changing problems it will have to solve. It is no discredit to Mr. Keen that many of his suggestions are put forward under various alternative heads. To many of the questions, *e.g.* as to the enforcement of decisions, no adequate answer has yet been given. It is probable that at first commercial boycott will be tried, having the obvious

[1] See this *Journal*, Third Series, vol. iv, pt. iv, pp. 240 f.

[2] *Towards International Justice.* By F. N. Keen, LL.B., with an Introduction by Prof. Gilbert Murray. (Allen and Unwin, Ltd.)

advantage of not sacrificing life. The war weapon is beset by endless difficulties. Suppose a war begun or threatened between two South American republics. Is this a cause for which a single British or French or United States soldier should be called to risk his life? Would a war on behalf of a League decision carry anything like the necessary enthusiasm which every just cause wants for its success? There are then the stupendous difficulties, which, however, we need not magnify, of restricting the armies of nations, and at the same time keeping them fit to enforce the League's will; in regard to combined action, the difficulties of command, transport, compensation, etc. The League has to live down the errors which beset its birth—the loss of time devoted to it, which suspended the Peace and allowed a cloud of fresh troubles to gather, the non-representation of Germany, and the inadequate representation of the United States, which leaves it lacking the support of these great Powers, and liable to such revision as they may claim as the condition of their adhesion. However great may be the difficulties of the future, they may be overcome by a healthy public opinion in the several countries; in fostering which such books as Mr. Keen's will do good service.

A. G.

The following books have also been received:

The Law of Monopolies in British India: Tagore Law Lectures, 1916, by P. K. Sen., M.A. (Cal.), M.A., LL.M. (Cantab.). Calcutta: M. C. Sircar & Sons, 1922. xx + 468 pp.

War and Armament Expenditures of Japan, by Giichi Ono. Carnegie Endowment for International Peace. Humphrey Milford, Oxford University Press, 1922. xviii + 314 pp.

Expenditures of the Sino-Japanese War, by Giichi Ono. Carnegie Endowment for International Peace. Humphrey Milford, Oxford University Press, 1922. xv + 330 pp.

Expenditures of the Russo-Japanese War, by Gotaro Ogawa, D.C.L. Carnegie Endowment for International Peace. Humphrey Milford, Oxford University Press, 1923. xvi + 257 pp.

Official German Documents relating to the World War, 2 vols. Carnegie Endowment for International Peace. New York: Oxford University Press, 1923. 1,360 pp.

Van Leeuwen's Roman-Dutch Law, vol. ii, by the Hon. Sir John G. Kotzé, LL.D. Second edition. London: Sweet & Maxwell, Ltd., 1923. iv + 810 pp.

Judgments of Lord Chancellor Birkenhead, 1919–1922. London: H.M. Stationery Office, 1923. xii + 556 pp. (£1 10s. net.)

The following periodicals are also received: American Bar Association Journal; American Economic Review; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bombay Law Reporter; Bulletin de la Société italienne pour les Études de Droit industriel;

Bulletin de l'Institut Intermédiaire international; Bulletin mensuel de la Société de Législation comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Columbia Law Review; Edinburgh Review; L'Egypte Contemporaine; Headway; Hindustan Review; International Labour Office Bulletin; International Review of Agricultural Economics; L'Italia che Scrive; Journal du Droit International; "La condition juridiqu edes associations internationales," par N. Politis; "La perte de la nationalité française et la prise de service militaire en pays étranger," par André-Prudhomme; "Le récent impôt hellénique sur la fortune mobilière et immobilière et les étrangers dans le domaine du droit fiscal international," par C.-G. Tene kides; "La clause compromissoire et l'arbitrage dans les rapports internationaux," par Maurice Picard; "Les étrangers et la loi des dommages de guerre," par Marcel Oudinot; Journal of the Parliaments of the Empire; Juridical Review; Law Quarterly Review; League of Nations Journal; Madras Law Journal; Revista de derecho jurisprudencia; Revue de Droit International et de Législation comparée; Revue International de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review.